No. 90-6297-CFY Title: Joseph Williams, Petitioner
Status: GRANTED v.
United States

Docketed: November 21, 1990 Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Hanson,Kenneth

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 21 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Dec 4 1990		Waiver of right of respondent United States to respond filed.
4	Dec 6 1990		DISTRIBUTED. January 4, 1991
5	Dec 22 1990	P	Response requested -- SOC. (Due January 21, 1991)
7	Jan 23 1991		Order extending time to file response to petition until February 21, 1991.
8	Feb 21 1991		Brief of respondent United States in opposition filed.
9	Feb 28 1991		REDISTRIBUTED. March 15, 1991
11	Mar 18 1991		Petition GRANTED.
			**********
12	Mar 28 1991	G	Motion of petitioner for appointment of counsel filed.
13	Mar 28 1991		Record filed.
		*	USCA 7-one vol.
14	Apr 3 1991		Record filed.
		*	one vol.-USCA 7.
15	Apr 22 1991		Motion for appointment of counsel GRANTED and it is ordered that Kenneth H. Hanson, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner in this case.
16	May 9 1991		Joint appendix filed.
17	May 24 1991		Brief of petitioner Joseph Williams filed.
18	Jun 7 1991		Brief of respondent United States filed.
19	Jul 8 1991		Reply brief of petitioner Joseph Williams filed.
20	Aug 21 1991		CIRCULATED.
21	Sep 5 1991		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 6, 1991 (4TH CASE)
22	Nov 6 1991		ARGUED.

(2)

No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

ORIGINAL

Joseph N. Williams)
)
v.)
)
United States of America)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

PETITION FOR WRIT OF CERIORARI

KENNETH H. HANSON
Attorney for Joseph N. Williams
135 South LaSalle Street
Suite 1940
Chicago, Illinois 60603
312/845-2900

30 pp

QUESTION PRESENTED

When the Sentencing Commission has determined that arrests not resulting in convictions, and convictions more than 15 years old, should not be considered in determining the defendant's criminal history category, should this Court permit a district judge to use such information in departing upward to a harsher sentence than that called for by the Sentencing Guidelines?

PARTIES

1. United States of America, Plaintiff in the U.S. District Court for the Western District of Wisconsin, Appellee in the Court of Appeals and respondent in this court.

2. Joseph N. Williams, defendant in the district court, appellant in the court of appeals and petitioner here.

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TABLE OF AUTHORITIES

JURISDICTION

The judgment of the United States Court of Appeals for the 7th Circuit, sought to be reviewed by this petition, was entered on August 27, 1990. No rehearing or extensions of time were sought. Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. Sec. 1254 by filing this petition by mail on November 20, 1990 and within 90 days of the judgment of the court of appeals as required by rule 13.1 of this court.

STATUTE INVOLVED

18 U.S.C. Sec. 922 (g) (1) is reproduced here:

Sec. 922

(g) It shall be unlawful for any person -
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

The defendant was indicted in the United States District Court for the Western District of Wisconsin charging that: "having been convicted of a felony did knowingly and unlawfully possess a firearm, a Virginian Dragoon, revolver .44 caliber magnum, having the serial number 0315, which had traveled in and affected interstate commerce. On July 25, 1989 the defendant was found guilty by a jury, after a trial before the Honorable Judge John C. Shabaz in the U.S. District Court for the Western district of Wisconsin. On September 20, 1989, Judge Shabaz entered judgement finding the defendant guilty of 18 USC Sec. 922 (g) (1) Possession of a firearm by a convicted Felon, and was sentenced to be imprisoned for a term of 27 months followed by a three year term of a Supervised Release. Notice of Appeal was timely filed on September 22, 1989. The United States Court of Appeals for the Seventh Circuit affirmed the judgement of the district court on August 27, 1990.

ARGUMENT FOR GRANTING THE WRIT

The district court determined that an upward departure from sentencing guidelines was warranted based upon "reliable information" indicating that the criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct nor the likelihood that the defendant will commit other crimes.

The district court in so departing considered two convictions more than 15 years old which were not counted in the criminal history. The convictions for the unlawful taking of a motor vehicle and forgery were both felonies and although having occurred in 1966 and 1967, respectively, they suggested to the district court that the defendant's career of criminal activity, unless discouraged, will continue. The district court also considered numerous arrests for which the defendant has not been prosecuted. The district court then held that the serious criminal conduct reflected in those arrests, coupled with those convictions more than 15 years old not considered in the guidelines, suggested after a review of all the relevant information, that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, category V. The district court accordingly determined that the defendant should be in category VI, rather than category V.

The Court of Appeals for the 7th Circuit held on review that it was error for the district court to consider the prior arrests of the defendant that had not resulted in convictions because they were not "reliable evidence" that the conduct described in the arrest entries was indicative of a more severe criminal history. The 7th Circuit held in this case and in United States

v Franklin, 902 F.2d 501, 508-09 (7th Cir. 1990) that a sentence may be upheld notwithstanding such error, if there are proper factors that standing alone would justify the departure.

However, the 9th Circuit held in the United States v. Hernandez-Vasquez, 884 F.2d 1314, 1315-16 (9th Cir. 1989) that:

> "The guidelines anticipate that departure will be rare. Sentencing Guidelines ch. 1 Para. A, introduction 4(b)... If a court relies on both proper and improper factors the sentence must be vacated and the case remanded." (emphasis supplied)

See also, to a like effect, United States v Zamarripa, No. 89-2145, 1990 U.S. App. Lexis 98251 at 14 (10th Cir. 1989).

There is thus a conflict between the 7th Circuit and the 9th and 10th Circuits as to the use of improper factors in sentencing. The 7th Circuit takes the position notwithstanding improper factors such as "prior arrests not resulting in convictions" in computing a sentence that the sentence may be upheld if there are proper factors standing alone that would justify the sentence.

The 9th and 10th Circuits hold that if a court relies on both proper and improper factors, the sentence must be vacated and the case remanded.

In view of all the above it is accordingly requested that this Court grant certiorari to fashion a proper standard of appellate review in guideline cases, and resolve the conflict between the 7th Circuit and the 9th and 10th Circuit Courts of Appeal as to whether or not a sentence must be vacated if both improper and proper factors are relied upon in sentencing or whether such a sentence may be upheld if there are proper factors standing alone that would justify the imposition of the sentence.

OPINION OF THE COURT OF APPEALS

United States of America v. Joseph N. Williams No. 89-3084

Argued April 19, 1990 - Decided August 27, 1990.

APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 27, 1990

BEFORE: Honorable Harlington Wood, Jr., Circuit Judge

Honorable Kenneth F. Ripple, Circuit Judge

Honorable Jesse E. Eschbach, Senior Circuit Judge

No. 89-3084

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

JOSEPH N. WILLIAMS,
Defendant - Appellant

Appeal from the United States District Court for the
Western District of Wisconsin
No. 89 CR 47, Judge John C. Shabaz

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-3084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH N. WILLIAMS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Wisconsin.
No. 89 CR 47-8—John C. Shabaz, *Judge.*

ARGUED APRIL 19, 1990—DECIDED AUGUST 27, 1990

Before WOOD, JR. and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

RIPPLE, *Circuit Judge.* This is a direct appeal from a federal criminal conviction. After a jury trial, the appellant, Joseph Williams, was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to 27 months imprisonment, followed by 3 years of supervised release. Mr. Williams filed a timely appeal. For the following reasons, we affirm the judgment of the district court.

I
FACTS

Mr. Williams was the subject of an undercover investigation during 1988 and 1989. Paul Harding, an agent with the Bureau of Alcohol, Tobacco & Firearms, met with Mr. Williams on a number of occasions at the bus that Mr. Williams occupied as living quarters. Mr. Williams claimed to Agent Harding that he had no trouble handling a firearm, referred to "his .44," and also described how to manufacture ammunition for a .44 magnum weapon. On April 12, 1989, Agent Harding obtained a search warrant for the bus. The warrant was executed on April 20, 1989. The officers conducting the search discovered a loaded .44 caliber magnum in the lower right hand drawer of a desk located in the bus. Mr. Williams subsequently was indicted for being a felon in possession (on or about April 20, 1989) of a firearm, in violation of 18 U.S.C. § 922(g)(1).

The defendant introduced evidence at trial that the owner of the bus (Henry Yates) was actually the owner of the gun. Yates testified that, during the day on April 19, 1989, he took the gun to an area near the bus and fired at tree stumps. He went into the bus, cleaned the gun, and placed it in the desk while Mr. Williams was not present. He left it there inadvertently and had not removed it by the time the search warrant was executed the next day. Another witness, Phyllis Orlando, testified that she had looked into the drawer the day before the search warrant was executed and did not see a gun.

The government introduced testimony at trial from Agent Harding who said that he met with Mr. Williams over a four month period and that, on January 9, 1989, Mr. Williams told Agent Harding that he had fired .44 magnum guns and that he had no problems firing such guns. On January 18, 1989, Agent Harding again met Mr. Williams at the bus. During this meeting, Mr. Williams told Agent Harding that he could handle .44 magnum guns. Agent Harding testified that the defendant then reached toward

the top drawer of the desk and, before actually opening the drawer, turned to Agent Harding and pretended as if he were pulling a trigger on an imaginary gun. They then went to a nearby van. Mr. Williams pointed out bullet holes in the van and claimed that he had fired his .44 magnum into the van.

Agent Harding met once again with Mr. Williams on February 7, 1989. During their conversation Mr. Williams discussed how the .44 magnum operated. He pointed out a bullet hole in the desk that he claimed was an accidental discharge of the gun. At no point during any of these meetings did Mr. Williams actually show a gun to Agent Harding. However, several individuals testified at trial that they did see Mr. Williams in possession of a gun. One witness, Jonathan Anties, identified a firearm as the one shown to him by Mr. Williams in October 1988. Mr. Anties testified that Mr. Williams removed a .44 magnum from his desk drawer while the two were in Mr. Williams' bus. In addition, Mr. Anties testified that he saw Mr. Williams on 20 to 40 occasions with the firearm in his possession. Other witnesses, including neighbors and friends, testified to seeing Mr. Williams with a .44 magnum firearm during 1988 and 1989.

The jury found Mr. Williams guilty. The district court received the probation office's sentence calculations which indicated a range of 18 to 24 months imprisonment based on an offense level of 9 and a criminal history category of V. The district court departed upward from the guidelines, determining that the criminal history category did not reflect adequately the seriousness of Mr. Williams' past criminality. That particular finding was based, at least in part, on two felony convictions in 1966 and 1967 which were not considered in determining the criminal history category. The district court concluded that the correct criminal history category should be VI and sentenced Mr. Williams to 27 months imprisonment. Mr. Williams filed a timely appeal.

II
ANALYSIS

A. *Sufficiency of the Evidence*

Mr. Williams asserts that the "unimpeached" evidence of his witnesses indicated that Yates owned the firearm and that Yates normally kept the firearm locked in his bedroom. Appellant's Br. at 11. Furthermore, Mr. Williams stresses the story that Yates told at trial: that Yates came into Mr. Williams' bus to use an amateur radio, placed the firearm in a drawer by the radio, and forgot to take the firearm with him when he left. Based on this evidence, Mr. Williams claims that he did not have *knowing* possession of the firearm as required under 18 U.S.C. § 922(g)(1).

A defendant bears a heavy burden when he challenges the sufficiency of evidence. " 'The test is whether after viewing the evidence in the light most favorable to the government, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " *United States v. Herrero*, 893 F.2d 1512, 1531 (7th Cir.) (quoting *United States v. Pritchard*, 745 F.2d 1112, 1122 (7th Cir. 1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis supplied by *Jackson* court))), *cert. denied*, 110 S. Ct. 2623 (1990). Based on this demanding test, we cannot say that the evidence submitted to the jury made conviction impermissible. The evidence included eyewitness accounts tying Mr. Williams to the firearm and statements made by Mr. Williams to an undercover police officer bragging about owning and firing a .44 magnum. Faced with conflicting stories from a number of witnesses who claimed to see Mr. Williams in possession of the firearm and Mr. Yates' testimony to the contrary, it is quite possible that the jury decided to believe that Mr. Williams possessed the firearm. The evidence supporting such a conclusion is certainly sufficient to support Mr. Williams' conviction under the standard we must apply.

B. *Upward Departure*

According to the application of the Sentencing Guidelines, Mr. Williams was classified with a criminal history category of V. Combined with his offense level of 9, his sentencing range was 18-24 months. The district court determined that the criminal history category did not reflect adequately the seriousness of Mr. Williams' offenses and his propensity for committing additional crimes in the future. The court therefore increased the criminal history category from V to VI, yielding a sentencing range of 21-27 months. We examine the district court's departure from the Sentencing Guidelines "to determine whether it was reasonable in light of the district court's explanations for its departure at the time of sentencing." *United States v. Gaddy*, No. 89-3037, slip op. at 3 (7th Cir. July 26, 1990). We review the grounds stated for departure under the *de novo* standard, but accept factual findings supporting the departure unless clearly erroneous. Finally, we must determine whether the amount of departure was reasonable. *Id.* at 3-4; *United States v. Williams*, 901 F.2d 1394, 1396 (7th Cir. 1990); *see also United States v. Gardner*, No. 89-6289, 1990 U.S. App. Lexis 9887, at *5 (10th Cir. June 18, 1990).

The district court decided to depart because, in its view, the criminal history category did "not adequately set forth the criminal history of this Defendant." R.61 at 305. Mr. Williams claims that the departure was erroneous in two respects: the district court should not have considered two convictions that were more than fifteen years old,[1] and

[1] Guideline § 4A1.2(e)(1) limits inclusion in the calculation of criminal history to felonies that occurred within fifteen years of the commencement of the currently charged offense. However, application note 8 to that section recognizes that this time limit is not immutable: "If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct . . . , the court may consider this information in determining whether to depart and sentence above the applicable guideline range."

the court improperly counted arrests that did not result in conviction.

1. General principle: Guideline § 4A1.3

Guideline § 4A1.3 allows the district court to depart from the sentence "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct . . . ." Some types of information, such as arrest records, may not be considered in departing upward. Beyond what may not be considered, the guidelines provide only partial guidance by setting forth a nonexclusive list of what might be "reliable information." The guidelines direct that, after reviewing the evidence of a defendant's past criminality and propensity for future crime, the district court may "conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines." Guideline § 4A1.3.

2. Convictions more than fifteen years old

The district court took into consideration two felonies—unlawful taking of a motor vehicle and forgery—which were not included in the calculus for determining Mr. Williams' criminal history category because they occurred more than fifteen years prior to the current offense. *See* Guideline § 4A1.2(e)(1). The guidelines provide two ways for the district court to consider the old convictions for purposes of upward departure. First, application note 8 to § 4A1.2 allows the court to consider older convictions "[i]f the government is able to show that [the] sentence . . . is evidence of similar misconduct" or that the defendant received a "substantial portion of income from criminal livelihood." *See Gardner*, 1990 U.S. App. Lexis 9887 at *7-8; *United States v. De Luna-Trujillo*, 868 F.2d 122, 124-25 (5th Cir. 1989).[2] The sentences involved in this case are not suited for consideration under this rationale, because the two crimes apparently are nonviolent and thus substantially dissimilar to the current conviction (possession of a firearm).

The second way in which the old convictions might be considered is under section 4A1.3 as "reliable information." Dissimilar criminal conduct occurring more than fifteen years prior to the current offense still may be relevant in determining whether the criminal history category underrepresents the defendant's criminality. *Cf. United States v. Carey*, 898 F.2d 642, 645-46 & 646 n.5 (8th Cir. 1990) (even when record did not reflect whether old burglary convictions were violent crimes or gun-related, district court properly considered them as "reliable information" under § 4A1.3 to increase criminal history category on defendant convicted under 18 U.S.C. § 922(g)). As our colleagues on the Tenth Circuit recently commented, older convictions may "reflect a defendant who has shown himself to be, in reality, a recidivous criminal." *United States v. Jackson*, 903 F.2d 1313, 1318 (10th Cir. 1990) (district court properly referred to, *inter alia*, a twenty-one year old forgery conviction in applying § 4A1.3 to increase criminal history category of defendant convicted of being a felon in possession of ammunition). We conclude that such old convictions may—in appropriate circumstances—be "reliable information" indicating more extensive criminal conduct than otherwise reflected by the criminal history category.

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[2] In a similar case involving possession of a firearm by a felon, the Ninth Circuit determined that the district court correctly increased the criminal history score to account for convictions occurring more than fifteen year prior to the charged crime. The old convictions were for assault with a deadly weapon and assault and battery. "Inasmuch as they show a propensity toward violence and a willingness to use force, these crimes may be viewed as similar to possession of a firearm by a felon." *United States v. Cota-Guerrero*, No. 89-30082, 1990 U.S. App. Lexis 7464 at *5 (9th Cir. July 16, 1990).

Here, the two convictions in question were not the *sole* basis for departure. As we shall discuss more specifically later, the district court considered these convictions along with other aggravating factors that, taken together, required, in the district court's view, an upward departure. We cannot say that consideration of these two convictions as part of an overall assessment of the defendant's criminal background was inappropriate.

3. Previous arrests not resulting in conviction

At the sentencing hearing, the district court referred to the presentence report, which included a short discussion of the defendant's past charged criminal conduct that did not result in conviction, and the defendant's objections to the report. In addition, the Assistant United States Attorney presented the court with a copy of the defendant's arrest record.[3]

There is no dispute that a district court may not rely solely upon an arrest record as the basis for an upward departure. *See United States v. Cantu-Dominguez*, 898 F.2d 968, 970-71 (5th Cir. 1990); *United States v. Cervantes*, 878 F.2d 50, 55 (2d Cir. 1989); Guideline § 4A1.3. Evidence based solely on police records of the arrest is not sufficient to satisfy the "reliable information" requirement. *United States v. Cota-Guerrero*, No. 89-30082, 1990 U.S. App. Lexis 7464 at *6 (9th Cir. July 16, 1990). Nevertheless, the guidelines allow the district court to go beyond the arrest record itself and to consider whether the underlying facts evidence "prior similar adult conduct not resulting in a criminal conviction." Guideline § 4A1.3(e). Courts have construed this subsection to include charges

[3] The arrests included one for attempted rape and one for assault with a dangerous weapon. According to the presentence report, both charges were dismissed because the complaining witness failed to appear. Mr. Williams filed objections to the presentence report claiming that the two charges were each dismissed after the veracity of the complaining witnesses was called into question.

that were dropped when a witness failed to appear, *United States v. Gayou*, 901 F.2d 746, 748 (9th Cir. 1990), charges that were dismissed after the defendant made restitution to the victims, *United States v. Russell*, Nos. 89-6142 & 89-6219, 1990 U.S. App. Lexis 9851 at *12 (10th Cir. June 20, 1990), and admissions by the defendant that he committed non-charged criminal acts, *United States v. Spraggins*, 868 F.2d 1541, 1544 (11th Cir. 1989). The focus of our review upon appeal is whether the evidence of prior conduct is sufficiently trustworthy to be considered "reliable information."

The district court in this case specifically articulated the principle that it could *not* base an upward departure solely on the arrest record. However, while relying, at least in part, on the conduct described in the arrest record, it did not state, with any clarity, the factual basis for its reliance. The government notes that two of the arrests—for rape and for assault with a dangerous weapon—are described in the presentence report as having been dismissed because a complaining witness failed to appear. However, even if we assume that this description would be adequate for purposes of consideration under section 4A1.3, the defendant contested the accuracy of the description. The district court never resolved the disagreement. *See* Fed. R. Crim. P. 32(c)(3)(D). Therefore, we cannot say that, even with respect to these two arrests, the district court relied upon accurate and reliable evidence that the arrests are indicative of a more significant criminal history than reflected by the guidelines. The determination that the arrests indicated similar criminal conduct must be based on facts apart from the arrest record itself and articulated as such by the district court.[4]

[4] We do not mean by this that the district court must incant a precise formula when discussing prior arrests, *see United States v. Jordan*, 890 F.2d 968, 977 (7th Cir. 1989), but we do expect that the district court will articulate precise reasons for concluding that the arrests are "reliable information."

4. Harmless error

It was error for the district court to consider the prior arrests of the defendant that had not resulted in conviction because the court did not rely upon reliable evidence that the conduct described in those arrest entries was indicative of a more severe criminal history. Nevertheless, vacation of the sentence is not necessarily required. This circuit has adopted the rule that a sentence nevertheless may be upheld if there are proper factors that, standing alone, would justify the departure. *See United States v. Franklin*, 902 F.2d 501, 508-09 (7th Cir. 1990).[5] Therefore, we shall examine the other factors that the district court considered in deciding to depart upward.

In this case, the district court engaged in a searching inquiry into the entirety of Mr. Williams' past criminal conduct. In addition to considering the convictions more than fifteen years old, the court noted that Mr. Williams previously had been convicted of the same crime—felon in possession of a firearm. This court has acknowledged that a previous conviction on the same charge can support a finding that the criminal history category is inadequate. *United States v. Williams*, 901 F.2d 1394, 1398-99 (7th Cir. 1990); *United States v. Schmude*, 901 F.2d 555, 559 (7th Cir. 1990); *see also United States v. De Luna-Trujillo*, 868 F.2d 122, 124-25 (5th Cir. 1989). Moreover, Mr. Williams' propensity for violent crime was indicated by threats he made to the lives of DEA agents and their families. We conclude that, despite the error noted, the court correctly determined that Mr. Williams' criminality was not reflected properly in the criminal history category and that the relevant evidence justified the rather modest increase in sentence.

[5] *See also United States v. Rodriguez*, 832 F.2d 1059, 1066-68 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). *But see United States v. Zamarripa*, No. 89-2145, 1990 U.S. App. Lexis 9251 at *14 (10th Cir. June 11, 1990); *United States v. Hernandez-Vasquez*, 884 F.2d 1314, 1315-16 (9th Cir. 1989).

C. *Ineffective Assistance of Counsel*

Mr. Williams argues that he was denied effective assistance of counsel in four respects. He contends that counsel should have 1) challenged the search warrant; 2) challenged the underlying felony conviction; 3) obtained the criminal records of the government witnesses; and 4) substantiated through ownership records the fact that Yates owned the gun.

In order to succeed on a claim of ineffective assistance of counsel, the defendant "must demonstrate that: (1) 'counsel's representation fell below an objective standard of reasonableness' and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir. 1989) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)), *cert. denied*, 110 S. Ct. 873 (1990). The defendant has the burden of satisfying both prongs of this test. *Shepard v. Lane*, 818 F.2d 615, 619 (7th Cir.), *cert. denied*, 484 U.S. 929 (1987).

Mr. Williams' appellate counsel relies exclusively on conclusory allegations of ineffectiveness. For example, the entire discussion of the first two asserted grounds is as follows:

> In the case at bar Trial Counsel did not challenge the Search Warrant, and did not challenge Williams' prior convictions. Had he successfully challenged either of these 2 points the conviction of the defendant could not be sustained. To convict a defendant of *knowingly* receiving a firearm, which had been shipped in interstate commerce, after being convicted of a crime punishable by imprisonment in excess of one year, the prior conviction must be constitutionally valid.

Appellants Br. at 12-13. The brief does make reference to a document filed by Mr. Williams in the district court that details his assertions of ineffectiveness. Nevertheless, a more plenary discussion by counsel of the allegations in the context of the *Strickland* test is required.

Neither counsel's conclusory statements in the brief nor Mr. Williams' allegations in his document demonstrate that, *but for* the alleged errors by trial counsel, there is a "reasonable probability" that Mr. Williams would have been acquitted. On the basis of this record, we also are not convinced that trial counsel's performance fell below an objective standard of reasonableness. Mr. Williams presents no argument to explain how challenging the search warrant could have been successful in this case. Counsel is not required to make perfunctory motions with no basis of support in the record. Since appellate counsel suggests no such basis, it is impossible for this court to conclude that trial counsel was unreasonable in not making the motion at trial. *See Strickland*, 466 U.S. at 689 (because of the difficulty of evaluating trial decisions, court should be highly deferential when reviewing charges of deficient performance). We conclude, therefore, that Mr. Williams has failed to meet his burden of demonstrating ineffective assistance of counsel.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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United States District Court

SEP 20 1989

FILE

WESTERN District of WISCONSIN

UNITED STATES OF AMERICA
V.
JOSEPH N. WILLIAMS

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89-CR-47-S

(Name of Defendant)

Thomas D. Baehr
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Convicted Felon	I

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
568-62-2676

Defendant's mailing address:
Rock County Jail
200 Hwy. 14E
Janesville WI 53545

Defendant's residence address:

September 19, 1989
Date of Imposition of Sentence

Signature of Judicial Officer

John C. Shabaz, District Judge
Name & Title of Judicial Officer

September 20, 1989
Date

Defendant: JOSEPH N. WILLIAMS
Case Number: 89-CR-47-S

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twenty-seven (27) months, to be followed by a three (3) year term of supervised release. As special conditions of supervised release, it is ordered that the defendant 1) refrain from possession of firearms; 2) register with local law enforcement; 3) refrain from associating with persons who use/possess/distribute drugs, refrain from excessive use of alcohol, and refrain from all illegal drug usage, submit to urinalysis, or other testing to test for drug usage; 4) allow for the search of residence and/or property under his control and allow for seizure of contraband; and 5) share finsncial information as directed by the supervising U.S. Probation Officer. It is further adjudged that the defendant pay a $50 criminal assessment penalty which is due and payable immediately to the U.S. Clerk of Court, Western District of Wisconsin. The Court finds that the defendant's financial and employment history indicates the payment of a fine or the cost of incarceration and supervision would unduly depreciate his ability to support himself.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JOSEPH N. WILLIAMS
Case Number: 89-CR-47-S

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years. As special conditions of supervised release it is ordered that the defendant 1) refrain from possession of firearms; 2) register with local law enforcement; 3) refrain from associating with persons who use/possess/distribute drugs, refrain from excessive use of alcohol, and refrain from all illegal drug usage, submit to urinalysis or other testing to test for drug usage; 4) allow for the search of residence and/or property under his control and allow for seizure of contraband; and 5) share financial information as directed by the supervising U.S. Probation Officer.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: JOSEPH N. WILLIAMS
Case Number: 89-CR-47-S

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

* These conditions are in addition to any other conditions imposed by this Judgment.

15) You shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any hand gun, rifle or shotgun.

Defendant: JOSEPH N. WILLIAMS
Case Number: 89-CR-47-S

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States ~~the sum of $ _____, consisting of a fine of~~ $ _____ ~~and~~ a special assessment of $ 50.00 .

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

The defendant shall pay a special assessment as to the one-count indictment. in the amount of $50.00

This sum shall be paid ☒ immediately.
☒ as follows:

To the U.S. Clerk of Court, Western District of Wisconsin.

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: JOSEPH N. WILLIAMS
Case Number: 89-CR-47-S

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The Court accepts the guideline calculations as submitted by the Probation Office. It has determined that a departure is warranted based upon reliable information indicating that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. The Court in departing has considered two convictions which were not counted in the criminal history. The convictions for unlawful taking of a motor vehicle and forgery are both felonies and although having occurred in 1966 and 1967, respectively, they nonetheless suggest this defendant's career of criminal activity, unless discouraged, will continue. The Court also has considered the numerous arrests for which the defendant has not been prosecuted. The serious criminal conduct reflected in those arrests, coupled with those convictions not considered in the guidelines, suggest that after a review of all the relevant information this defendant's criminal history is significantly more serious than that of most defendants in the same criminal history category. Accordingly, the Court has added three points to the computation of ten and has determined that this defendant is in Category VI, rather than Category V.

The defendant is a 42-year-old offender with an extensive prior record. This is the second time he has come before the federal court for unlawful possession of a weapon. He has also threatened violence to undercover agents and is capable of violence. In view of his prior extensive criminal record and propensity for further crime and violence, the defendant is sentenced at the top of the guidelines.

No. 90-6297

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOSEPH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in upholding the district court's three-month upward departure from the Sentencing Guidelines, where it found some of the reasons given by the district court impermissible but concluded that other reasons were sufficient to justify the departure.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 910 F.2d 1574.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1990. The petition for a writ of certiorari was filed on November 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 27 months' imprisonment, to be followed by three years' supervised release.

The court of appeals affirmed (Pet. App. 2a-13a).

1. Petitioner's sentence under the Sentencing Guidelines was calculated as falling within the range of 18 to 24 months' imprisonment, based on an offense level of 9 and a criminal history category of V. Having determined that the criminal history category did not adequately reflect the seriousness of petitioner's past criminal conduct, the court used the next higher criminal history category and sentenced petitioner to 27 months' imprisonment--an upward departure of 3 months.

2. In examining the correctness of the district court's decision to depart upward, the court of appeals found that the court's reliance on two previous convictions more than 15 years old was appropriate under § 4A1.3 of the Guidelines, which allows consideration of old convictions as "'reliable information' indicating more extensive criminal conduct than otherwise reflected by the criminal history category." Pet. App. 8a. The court of appeals also found that a second basis for the court's departure--conduct of petitioner that resulted in arrests but not convictions--was invalid because the court did not articulate accurate and reliable information, apart from the arrest record, that justified departure on that basis. Pet. App. 9a-10a.

The court of appeals nevertheless upheld the sentence, finding an adequate basis for the three-month departure in the valid factors relied on by the district court. These included not only the two convictions more than 15 years old, but also a previous conviction for the same offense as well as threats that petitioner

had made on the lives of DEA agents and their families. The court held that all of these factors provided ample evidence for the court's finding that the criminal history category did not adequately reflect petitioner's past criminal conduct, and therefore justified the "rather modest increase in sentence." Pet. App. 11a.

ARGUMENT

Petitioner claims (Pet. 5-8) that the court of appeals erred in failing to vacate a sentence that departed upward from the Guidelines, where the district court relied on both permissible and impermissible factors for the departure. He argues that the decision below conflicts with Ninth and Tenth Circuit cases in which the courts of appeals remanded for resentencing where both proper and improper factors were used to justify upward departures from the Guidelines range.

In fact, however, the different outcomes in the instant case and those cited by petitioner do not indicate any conflict in the legal interpretation of the Guidelines; rather, they reflect merely a difference in the extent to which the reviewing court in each case was able to determine whether the departure was justified by a legally permissible factor.

In United States v. Hernandez-Vasquez, 884 F.2d 1314 (9th Cir. 1989), the district court departed upward from the applicable Guideline range by eight months, based on three different factors. The court of appeals found that two of the three grounds for departure were improper, and that the third and proper factor could

justify an enhancement of no more than three months. The court directed that the district court amend its sentence accordingly. Id. at 1316.[1/]

In United States v. Zamarripa, 905 F.2d 338 (10th Cir. 1990), the district court imposed a sentence of fifteen months; the court stated that it was departing from the Guidelines, which appeared to contemplate a range of two to eight months, but it did not specify what it considered the applicable Guideline range. Id. at 339. The court of appeals found that two of the factors relied on by the district court were not proper bases for departure, but found that the third stated ground for departure might be proper. Id. at 340-341. However, in light of the district court's failure to state with specificity the precise Guideline range from which it was departing, in combination with the errors made by the district court in relying on invalid factors, the court of appeals concluded that it could not ascertain whether the sentence imposed was a reasonable departure or not. Accordingly, it remanded for resentencing. Id. at 340-342.

In contrast with these decisions, the court of appeals in this case was able to determine that the district court's departure of three months was based on proper grounds and was appropriate on

[1] In another Ninth Circuit decision, United States v. Nuno-Para, 877 F.2d 1409 (1989), on which the Hernandez-Vasquez court relied, the court of appeals also remanded for resentencing. But again, the court there found that the reasons primarily relied upon by the district court in making its departure decision were not proper bases for departure. The court found it impossible to tell whether the sentence imposed was justified by any permissible factors. 877 F.2d at 1414.

those grounds. As the court of appeals observed, the district court conducted a "searching inquiry" into the entirety of petitioner's past criminal conduct, and it identified several factors that warranted an increase in petitioner's criminal history category. Particularly in light of the modest departure of only three months, the court reasonably concluded that the grounds for departure in this case were so clear as to obviate the need for a remand for resentencing.[2/]

This Court has already denied review in a similar case in which it was also claimed that the court of appeals should have remanded for resentencing because the court relied both on permissible and impermissible factors for an upward departure from the Guidelines range. Just as in this case, the court in United States v. Christoph, 904 F.2d 1036 (6th Cir. 1990), cert. denied, No. 90-5535 (January 7, 1991), was able to determine, based on the degree to which the defendant's criminal history score failed to take into account his history of criminal activity, that an upward departure of 19 months was justified on that valid basis alone, without regard to the additional factors on which the district court should not have relied. 904 F.2d at 1041-1042. Like

[2] Another case decided by the Seventh Circuit, and on which the court in this case relied, United States v. Franklin, 902 F.2d 501 (1990), involved a departure based on two permissible factors and one improper one. The court discussed the reasonableness of upholding a departure without remanding for resentencing as long as the reviewing court could determine that the permissible grounds would justify the full length of the departure made. And in that case, too, the court was able to say with confidence that the permissible grounds for departure provided an ample basis for the entire amount of the departure selected by the district court. 902 F.2d at 507-509.

Christoph, the instant case is not in conflict with other cases with regard to the legal principles governing upward departures from the Guidelines. Rather, the courts have made case-by-case determinations, based on the facts presented in each case, of the appropriate disposition under the broad authority granted them by 28 U.S.C. 2106.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

FEBRUARY 1991

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOSEPH N. WILLIAMS PETITIONER	)	
V	)	NO. 90-6297
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on February 21, 1991.

KENNETH H. HANSON
135 SOUTH LASALLE STREET
SUITE 1940
CHICAGO, IL 60603

Kenneth W. Starr
KENNETH W. STARR
Solicitor General

February 21, 1991

90-6297

No._____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

Joseph N. Williams)
)
v.)
)
United States of America)

ORIGINAL

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Joseph N. Williams by his attorney moves for leave to proceed in Forma Pauperis. In support of the motion counsel states that Kenneth H. Hanson was appointed by the United States Court of Appeals for the 7th Circuit under the Criminal Justice Act 18 USC Sec. 300A(d)(6).

Kenneth H. Hanson

KENNETH H. HANSON
Attorney for Joseph N. Williams
135 South LaSalle Street
Suite 1940
Chicago, Illinois 60603
312/845-2900

9

No._____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

Joseph N. Williams)
)
v.)
)
United States of America)

90-6297

CERTIFICATE OF SERVICE

Kenneth H. Hanson, a member of the bar of this court hereby certifies that on November 20, 1990 he mailed one copy of the petition for writ of certiorari and one copy of the motion for leave to proceed in form pauperis to the Solicitor General, Department of Justice, Washington, D.C. 20530 and an additional copy of each of those documents was mailed to United States Attorney Daniel P. Bach, Western District of Wisconsin, 120 N. Henry Street, Room 420, Madison Wisconsin, 537031 on November 20, 1990. Mailing was accomplished before 5:00 p.m. at the Loop Post office, Clark and Adams Streets, Chicago, Illinois on November , 1990 first class postage was pre-paid.

Kenneth H. Hanson

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Attorney for Joseph N. Williams
135 South LaSalle Street
Suite 1940
Chicago, Illinois 60603
312/845-2900

90-6297

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

Joseph N. Williams)
)
v.)
)
United States of America)

CERTIFICATE OF FILING BY MAIL

Kenneth H. Hanson, a member of the bar of this court hereby certifies under penalty of perjury that he mailed 12 copies of the petition for writ of certiorari and one copy of the motion for leave to proceed in form pauperis to the Clerk of the United States Supreme Court, Supreme Court Building, Washington, D.C. 20543. Mailing was accomplished at the Loop Post office, Clark and Adams Streets, Chicago, Illinois on November 20, 1990 before 5:00 p.m. first class postage was pre-paid.

Kenneth H. Hanson

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No. 90-6297

In The

Supreme Court of the United States

October Term, 1990

JOSEPH N. WILLIAMS,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

KENNETH H. HANSON*
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Petition For Writ Of Certiorari Filed November 21, 1990
Certiorari Granted March 18, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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September 22, 1989	Notice of Appeal, Court appointed attorney.
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September 27, 1989	Criminal case docketed.
April 19, 1990	Oral arguments heard.
August 27, 1990	Filed opinion of the Court.
August 27, 1990	Order. Final Judgment, Affirmed. With costs.
November 30, 1990	Filed Notice of filing petition for writ of certiorari in the United States Supreme Court.
March 21, 1991	Filed Order from the United States Supreme Court Granting petition for Writ of Certiorari.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 89 CR 47 S

JOSEPH N. WILLIAMS,

Defendant.

SENTENCING
BEFORE THE HONORABLE JOHN C. SHABAZ

Madison, Wisconsin
Tuesday, September 19, 1989

[252] CLERK: All rise. All persons having business before the Honorable Judge John C. Shabaz of the United States District Court for the Western District of Wisconsin will draw nigh and give their attention. This Honorable Court is now in session. God save the United States and this Honorable Court. Please be seated and come to order.

THE COURT: The purpose of the hearing today is to determine the sentence to be imposed. The defendant and counsel reviewed the presentence report in this matter including the revisions which have been filed. The Court will place the presentence report in the record under seal together with the defendant's objections to the presentence report and the addendum to the presentence report. The Court will, if an [253] appeal is taken, counsel, on appeal, are permitted access to the sealed report.

The Court, however, does not permit access to any recommendation for sentence which may be a part of the presentence report. The Court is unaware of information which has been withheld from the report, and accordingly has no summary to place in the record. The Court is in receipt of what appears to be an affidavit of Joseph N. Williams, in which he suggests that he believes that counsel was ineffective in the matter. He advises this Court, in a lengthy statement of facts that counsel failed to obtain certain criminal conviction records of certain witnesses, that counsel failed to obtain documents needed to support witnesses testimony, failed to investigate and further concludes that he is informed – that counsel has informed Defendant that he is withdrawing from the case at the end of sentencing, as per a conversation on September 17, 1989.

The Court notes that the Defendant intends to appeal his conviction, and also refers to Rule 2255 and Rule 35. The Court will make this affidavit a part of the record, and the Defendant has referred to those appropriate proceedings which he believes that he may pursue. Accordingly at this time, we will attempt to determine those issues which are in dispute. The Defendant's objections to the presentence report are on file.

Now, for each issue of fact that is in dispute, this Court [254] will make either a finding or a determination that no such finding is necessary, because the matter disputed will not be taken into account in sentencing. To assure that a written record is made of the findings and this Court's determinations, it is required that there be appended a transcript of this portion of the proceeding to the presentence report. Mr. Bach, you have noted, have

you, that there are certain objections to the presentence report.

MR. BACH: Yes, your Honor.

THE COURT: Looking, then, at those numbered objections and following along with the Court, Mr. Baehr. Mr. Bach, and Mr. Williams, the Court has an addendum to the presentence report, and each of those objections have been numbered. Mr. Williams, are you familiar with the addendum to the presentence report?

MR. BAEHR: That's what this is.

MR. WILLIAMS: Yes, sir.

THE COURT: And have you read that and discussed that and the presentence report with your attorney, Mr. Baehr?

MR. WILLIAMS: Yes, sir, we went over it a little while ago out in the attorney's room there, and we discussed how it was going to be handled, and he will go ahead on from here with whatever has got to be said, and I'll just sit here and listen, sir. Thank you.

THE COURT: All right. The Court notes that the [255] Defendant called attention to two errors relating to the docket number, and the second relates to the release status. The Court will find that the correct docket number to be placed on all documents filed in this matter is 89-CR-47, rather than the typographical error of 88-CR-47. The Court will further find, as to the second item, that the release status should indicate that the Defendant has been in custody since May 1, 1989 rather than May 2 of 1989, and the wording should be changed "upon Defendant's surrender to federal authorities" with no

reference to an arrest. Does that, then, resolve those first two items. Mr. Baehr?

MR. BAEHR: Yes, it does, your Honor.

THE COURT: The next, then, relates to the offense under the offensive conduct which is related to the presentence report, beginning at Page 2, and particularly refer to Paragraph 11 at Page 3. The objection relates to that language, "several other meetings occurred." On April 16, 1989, a confidential informant observed Williams remove an old, western-style revolver from the bottom right-hand drawer of the desk in Williams' bus. Williams had alluded to this gun during several previous meetings, and the further paragraph number 13 at Page 3, that was 11 of Page 3, and also that language at paragraph 13 of Page 3 in which the objection is made where the Defendant concedes that he once alluded to "DEA agents found floating in puddles", and to the fact that "DEA agents had a [256] $25,000 prize on their heads in Peru," but denies that he made the reference more than once; and although the statements admittedly sound appalling, Defendant denies that these statements were intended as serious threats to do bodily harm, again reminding the Court that he surrendered to federal authorities, and points out that there is no suggestion that he, in any way indeed impeded or obstructed the justice. Mr. Bach, do you wish to refer to those objections numbered 2 and 3 in the addendum to the presentence?

MR. BACH: Yes, your Honor. The Government believes that there is a dispute about those, and I intend

to offer the brief testimony of Special Agent Harding on those two points.

THE COURT: All right, sir. You may proceed at this time and cover any of those – I believe that would then cover the statement of the offense; would it not? Yes, sir.

MR. BACH: The Government calls Special Agent Paul Harding.

THE COURT: If there are any other points in dispute which you believe the testimony would relate to, you may also proceed on that. The Court has it for items 2 and 3. The witness may be sworn.

(Witness sworn)

DIRECT EXAMINATION

BY MR. BACH:

Q. Would you state your name, please?

[257] A. My name is Paul Harding, H-a-r-d-i-n-g.

Q. And where are you employed, sir?

A. I'm a Special Agent with the Bureau of Alcohol, Tobacco & Firearms in the City of Milwaukee.

Q. And were you the case agent in the investigation leading to the charges against Joseph Williams with which we are concerned here today?

A. Yes, I am.

Q. I'd like to direct your attention to April 16th of 1989. Were you conducting surveillance on that date as part of your employment with ATF?

A. Yes, I was.

Q. And could you describe where you were conducting surveillance and what it was in relation to, please?

A. I was located about 200 yards from Mr. Williams' residence at 10320 County Highway Y, Mazomanie, Wisconsin behind a grove of trees, and the surveillance was to monitor – electronically monitor a meeting between a confidential informant and Mr. Williams.

Q. And how were you able to electronically monitor that conversation between the informant and Mr. Williams?

A. Prior to that informant traveling to the meeting with Mr. Williams, I had placed an electronic transmitter on his person.

Q. Had you been to the vicinity of this meeting before?

A. Yes, I had.

[258] Q. Had you, in fact, been to Mr. Williams' residence on County Highway Y before?

A. Yes, I had.

Q. And was this the area that you were on April 16th, 1989?

A. Yes, it is.

Q. And what transpired during this meeting, according to what you could overhear?

A. We monitored the arrival of the informant. The informant met with Mr. Williams and several other people. Discussions were carried on. At one point there were firearms being fired, which if they took a very short walk from the bus and there were firearms being fired, we could hear the report coinciding with the sound coming across the transmitter. It was in the direction where we knew Mr. Williams' residence to be. After the firing stopped, they went inside to the bus, and the informant had a conversation with Mr. Williams.

Q. Based on what you could overhear on the – during the surveillance, approximately how many people were there?

A. It was very hard to tell. I would say there was a minimum – I would say a minimum of five.

Q. And from having met Mr. Williams in the past, were you able to distinguish his voice over the wire that you were listening to?

A. Very clearly.

Q. Did you hear any discussions concerning the .44 caliber [259] revolver that was the subject of this case during that meeting on April 16th?

A. Yes, I did.

Q. And what did you over hear?

A. I heard the person that I recognized to be Mr. Williams showing it to the informant, and describing that it was his, and that he kept it loaded at all times.

Q. What specific references to the gun did Mr. Williams make? Did he identify what type of gun it was?

A. No, he did not, not to my recollection.

Q. How did you know that he was talking about the gun that was involved in this case?

A. He said it was a .44 magnum.

Q. And do you recall specifically what he said?

A. I don't recall his specific words.

Q. Do you recall generally what he said about that gun?

A. Basically that it was his and that he kept it loaded at all times.

Q. After the meeting between the informant and Mr. Williams on that date, did you discuss with the informant what had transpired during the meeting?

A. Yes, we did.

Q. And what did the informant tell you?

A. He said that he had arrived there, had met with Mr. Williams and other people. They had gone out back and fired [260] different weapons that were brought by some of the other people. They did not fire the .44 magnum revolver, the Interarms Virginian Dragoon. That did not come out of the bus. After they were done firing weapons, they went inside, and it was at that point that the revolver was shown to him. It was described as being Mr. Williams' and being kept loaded at all times.

Q. Did you use the information that you heard over the wire, and what the confidential informant told you as part of an affidavit that you filed in this Court to obtain search warrants for Mr. Williams' residence?

A. Yes, I did.

Q. And when did you obtain that search warrant, do you recall?

A. April 18, 1989.

Q. So that was just two days after this meeting between the informant and Mr. Williams?

A. Yes, it was.

Q. How many – approximately how many meetings did you have with Mr. Williams during your investigation, if you recall?

A. I believe it was seven meetings of length, and one additional, very short meeting.

Q. And during these meetings, did Mr. Williams make any threats either to you or in regard to other people?

A. Yes, he did.

[261] Q. And what did he say on these occasions, and could you describe how often he said these things?

A. He made specific – one lengthy and specific threat to me and my family during one meeting, with several other generalized implied threats. The lengthy one, essentially summed up, was that if I ever – didn't take care of business right, that he was going to make sure that I was taken down. I took that threat to mean that I would be arrested with him. He then went on to say that he would track down wherever my family lived, and he would blow up my house with my old lady in it, if I didn't take care of business right.

Q. Do you remember when he made that statement to you?

A. That was on November 8th, 1988.

Q. And you said he made other generalized threats. What were those type of threats, to the best of your recollection?

A. He said things – well, one specific incident was in reference to Kenneth Jessick. He said that if he had the opportunity, he would help Jessick fall off a cliff. He made a lot of generalized statements, implied kind of things about people would be hurt if they didn't take care of business right. He wasn't going down alone. He wasn't going back to jail, these type of statements.

Q. And did these occur just on one date, or did they occur on various occasions when you met with him?

A. No, they occurred pretty much over the entire six months [262] that we met.

Q. Did you ever hear him make any statements concerning DEA agents?

A. Yes, I did.

Q. And what were those statements?

A. He made, again, one lengthy and specific statement with a number of shorter references that were implied after that, The first – the lengthier statement was in reference to – he said he had been talking on his Ham radio to his drug suppliers in Peru, and that they had advised him that there was a $25,000 bounty on every DEA agent's head that they sent down that way. He also

said, during that same meeting, that that was why DEA agents were turning up floating face down in puddles. He made other statements throughout our meetings in reference to people doing business bad, that "that's why DEA agents were found buried. That's why DEA agents were found floating in puddles."

Q. Do you recall when he made the first specific statement that you referred to concerning DEA agents?

A. December 14, 1988.

Q. And were the other statements concerning DEA agents found floating in puddles, do you remember when those were made, roughly?

A. In the following meetings. I don't remember specific dates on the shorter statements, because they were thrown in, among other conversation, on different dates.

[263] Q. They would have been between, say, January of 1989 and –

A. Yes, they were following this first lengthy statement on December 14th.

MR. BACH: I have nothing further.

THE COURT: Mr. Baehr, you may cross.

CROSS-EXAMINATION

BY MR. BAEHR:

Q. Were you able to distinguish any of the other voices who were present at this April 16th meeting?

A. Yes, there was one voice I distinguished.

Q. Do you recall who that was?

A. Henry Yates.

Q. Okay. Were you able to determine who any of the other people were who were present?

A. Other than the confidential informant, no.

Q. Pardon?

A. Other than the confidential informant, I did not know the other persons.

MR. BAEHR: Do you have any questions you want me to ask Mr. –

MR. WILLIAMS: Can I ask him?

MR. BAEHR: Sure.

MR. WILLIAMS: Mr. Harding, on that day that we was at the bus –

MR. BACH: I'd object to the Defendant himself posing [264] the questions, your Honor. I think it should be done through counsel.

MR. BAEHR: Fine.

THE COURT: That's correct.

(Off the record discussion)

Q. (MR. BAEHR) Were you able to determine, through your investigation, whether there were any automatic weapons being fired that day, or semiautomatic weapons being fired that day?

A. Not through my investigation I couldn't tell, only through the monitoring of it.

Q. Okay, and through the monitoring of it, were you able to determine whether more than one weapon was being fired?

A. I got the impression that there were several weapons being fired.

Q. Were you able to determine, by monitoring it, whether they were automatic or semiautomatic, or whether they were revolvers?

A. I heard no automatic fire, full automatic fire.

Q. Okay. Did you hear anything that – well, would you be able to determine, by monitoring the events, whether any of them were semiautomatics?

A. Not really. You're trying to compare rates of speed of fire at that point.

Q. Okay. Did you discuss with the confidential informant, after you monitored this conversation, who was there and what [265] had happened?

A. There were – yes, we did.

Q. You did, all right. Did he tell you what he observed in terms of what was being fired?

A. I believe one of the weapons that he mentioned was a .22 caliber rifle. We – the main thing we focused on at that point was the firearm that we were looking for.

Q. Did he describe any automatic weapons being fired?

A. Are we again referring to full automatic as opposed –

Q. No? I take it the answer to that question is no?

A. He described no full automatic weapons.

Q. Fine. Did he describe any semiautomatic weapons?

A. There may have been a semiautomatic rifle. I don't – again, we didn't get into that in specifics. He may have mentioned that.

Q. I'd like to move on, at this point, to the conversation regarding the DEA agents. Mr. Williams didn't describe these as his connections, did he?

A. That was the impression I got, but I don't remember any specific words from Mr. Williams stating that.

Q. Okay. If Mr. Williams were to describe this as a general conversation about drug dealers in South America, and about what they do to law enforcement officers, including DEA agents, would that be a fair characterization in your mind, or would you object to that characterization?

[266] A. I would have to object to that. I think he specifically said – well, I should not use the word "specifically." As I recall, he said – we were talking to my people and people in Peru, and I got the impression he was referring to people he had done business with, it was far more specific than a generalized statement of what drug dealers in Peru do.

Q. Okay. He's a Ham radio operator, correct?

A. Yes, he is.

Q. Did he describe to you having conversations over the Ham radio with people in Peru?

A. Yes, he was – if not specifically, that was the impression I received, that he was referring to radio transmissions.

Q. Okay. At any other point in your investigation, did he ever refer to having any connections by way of drug dealing connections to anyone in Peru or South America?

A. No, not in South America.

Q. Okay. In fact, at one point, I think he indicated that he might have had some kind of a connection in Milwaukee?

A. No, I don't believe so. I believe it was Madison.

MR. BAEHR: I don't believe I have any further questions for this witness, your Honor.

THE COURT: Anything further?

MR. BACH: Nothing further, your Honor.

THE COURT: The witness may be excused. Does the Government have anything as it relates to objections 2 and 3?

[267] MR. BACH: No, your Honor.

(Off the record discussion)

THE COURT: Mr. Baehr?

MR. BAEHR: Mr. Williams would like to offer some information to the court, and I guess as a question

of procedure, does the Court have a preference whether he makes a statement, or would you prefer to have him sworn and proceed by testimony?

THE COURT: He may be sworn and take the stand.

(Witness sworn)

DIRECT EXAMINATION

BY MR. BAEHR:

Q. Would you please state your name for the record?

A. My name is Joseph Neil Williams.

Q. Okay. You're the Defendant in this case, is that correct?

A. Yes, sir.

Q. Mr. Williams, I'd like to direct your attention to April 16th, 1989. Do you recall some people being present at your bus?

A. Yes, there was about a half a dozen people there.

Q. Okay, and did any of them bring any firearms with them?

A. Yes, sir. Brian brought over a brand new Israeli model .44 magnum, along with a semiautomatic. .3006. Henry brought out his .22 caliber rifle, and I believe another person there had a .22 caliber pistol that they were shooting.

[268] Q. Okay, and who was doing the shooting?

A. Brian and Henry and the other person were out there shooting while I was sitting in the bus. A couple of times I walked out and watched them, but most of the time I was talking on the radio on the bus.

Q. Okay. What happened after they finished shooting?

A. We all congregated in the bus, and Brian was showing me how easy his new weapon would disassemble and go back together. We talked about it, and he said something about keeping it unloaded, and I told him – I said, "There's no way. If that was mine, I'd have it loaded. What the hell good is an empty gun?" and that's what I told him, you know. I mean, that's what they taught us in the service, so that's what I related to him.

Q. Okay. Did you show him any weapons?

A. No, sir, I never brought out any weapons that day. There wasn't any in the bus to bring out, except for what they owned themselves.

Q. And those were the weapons that they were firing?

A. Yes, sir.

Q. I'd like to direct your attention to conversations that you have with Mr. Harding concerning DEA agents. Did you claim that you had any drug connections to Peru?

A. No. What I talked about was that the drug connections in Peru that were operating down there, that

people who were [269] operating in Peru and Colombia, they had on the news – prior they had been talking about that there was $25,000 rewards on the heads of some of the DEA agents and things. This is what the gist of that conversation was. I said that their head was worth $25,000 down there in Peru. I didn't threaten him.

Q. Were you referring to radio conversations that you had had over your Ham radio?

A. Yes, also radio communications that I had had with individuals down there in Colombia and Peru.

Q. So you were describing conversations that you had had.

A. Basically, that's what I was describing. I wasn't threatening any of the people. I was telling him what was being said out there, and what the people were talking about was going on out there.

Q. Okay. Is there anything else you'd like to say?

A. The deal with Kenneth Jessick there when I – the original informant that brought him around to the house had to do with the fact that the guy owed me some money and ran out on paying me back some money. It had nothing to do with the fact that the guy was an informer or anything. At that time, I knew that he had informed, but I wasn't – I knew that that man there was also an undercover agent the whole time that he was coming around.

I had been informed that he was an undercover agent, and the statements that were being made and so forth were – I [270] mean, I kept telling the guy, "You're a cop, man. You know, what are you doing coming around

here?" You know, that "I'm not doing anything." So finally I just started talking a long line of crap to the guy, man, you know, trying to make him understand that he wasn't invited. There was nothing being said that would actually mean that he was, himself, being threatened or I was going to do anything to the guy. If I had any intentions of hurting anybody, I would have never turned myself in.

As far as his family and stuff goes, the thing on that was, you know, I said that a guy who was snitching, or somebody that is – rips another guy off and puts people in a bad way with their family, and takes them away from their family, ought to be punished in the same way. They ought to be removed from their family. I told him that at that time – when I told him what I have said, I was referring to the fact that if he was to screw me up, that he would have to go do the same time that I was going to do, because we were both going to go to jail together. I wasn't going to go to jail alone, and that his family would just have to suffer like mine would. That's what I was referring to. As far as wasting anybody's family or hurting them like that, that wasn't –

Q. That wasn't what you intended?

A. No, sir.

MR. BAEHR: I don't believe I have any further [271] questions, your Honor.

THE COURT: Mr. Bach, any questions?

CROSS-EXAMINATION

BY MR. BACH:

Q. Mr. Williams, you admit that you were at your residence on April 16, 1989.

A. Yes, sir. When I disagreed to that, I was thinking that it was at the evening time that they were referring to, that this party had come over there. I still don't know who this supposedly confidential informant is.

Q. You can answer just "yes" or "no" to my questions unless I ask you to go further.

A. Yes, sir.

Q. Do you recall that date specifically?

A. I recall, when he brought up the weapons, the number of weapons that were being discharged out back, and the number of people that were there at the time, yes.

Q. You're certain that the date that you're talking about is April 16th of 1989.

A. It could have been the 14th, sir. It could have been the 17th. It could have been the 16th. It was thereabouts, that period, yes, sir.

Q. Who is Brian?

A. Brian is an acquaintance of mine. Any more name than that, sir, you'll have to figure that one out for yourself.

[272] Q. What's his last name?

A. I can't tell you that, sir.

Q. Because you don't know?

A. That's the truth on that, yes, sir. I don't know his last name. I never did. Where I come from, that's not a custom thing you do, is infringe on another man's last name.

Q. You claim you didn't do any shooting at all on April 16th?

A. No, sir, I didn't fire any of the firearms on that day.

Q. You said you were in the – your bus the whole time?

A. No, sir, I did go out and watch some of the time. The majority of the time, I was in there talking on the radio.

Q. Now, you said that this was – when you went back in the bus, that this was this Brian's .44 caliber magnum that people were talking about?

A. Yes, sir.

Q. Would you have ever referred to that gun as yours, or made any statements in connection with the gun being yours?

A. Sir, I said that if that was my weapon, because he was talking about storing it empty or carrying it around empty – I said that if that would have been my weapon, if that was my weapon, if I owned a weapon of that nature, there is no way I would carry it around empty. It would be absolutely useless empty.

Q. So in other words, you didn't tell anybody there, according to your testimony, that it was your weapon; is that right?

[273] A. No, sir, I couldn't have owned that weapon if I had wanted to. It's 600 bucks. I had no kind of money like that.

Q. Who were your conversations with in South America?

A. Several people, sir. I'd have to have my log book to be able to tell you who was who there.

Q. Well, who are these people generally?

A. Generally, they're people that are on the radio all the time. Some of them were hooked up with the contras. Some of them were hooked up with just the general population down there. Some of them – some of the people I talked to were ambassadors. I talked to all sorts of people, depending on whether I was working Ham radio or whether I was working citizen ban frequencies.

Q. Mr. Williams, during this time period – these statements that we're talking about, statements concerning DEA agents, roughly, you were selling marijuana to people at that time; weren't you?

A. I was doing what, sir?

Q. You were selling marijuana to people.

A. I was smoking marijuana at that time, sir.

Q. You were also selling marijuana to various people that you knew around the area of Mazomanie; weren't you?

A. I was smoking marijuana, sir.

Q. Do you deny that you were selling marijuana to anyone?

A. I would rather not answer anything of that nature, sir, in [274] that direction, on the grounds I may tend to incriminate myself for further prosecution down the road.

Q. Do you deny that you were buying controlled substances such as cocaine and marijuana?

A. I was not buying cocaine. I had quit buying anything to do with cocaine, sir, almost seven, eight months prior to that, due to the fact that I had had a problem with it, and I caught myself trying to sell one of my radios.

Q. That's fine, Mr. Williams. Isn't it a fact that the reason that you made comments to Agent Harding and to the other people who were present concerning DEA agents being found in puddles, is because you were trying to give the people present the impression that they were going to find trouble if they informed on your drug dealing activities to law enforcement authorities; isn't that the truth, Mr. Williams?

A. No, sir. What I was trying to do is tell people what was going on out there, and that I didn't appreciate people coming around if they were snitches and like to go telling on everybody for things they do.

Q. Such as yourself.

A. I believe that a man's right to what he does is his own business, and not somebody else's business, as long as he keeps it to himself on his own property.

Q. You found out about the search warrant being executed at your house on the day that it was executed, isn't that right, [275] April 20th, 1989?

A. Yes, sir.

Q. And you didn't turn yourself in until May 1, 1989; isn't that right?

A. Sir –

Q. Did you or did you not turn yourself in May 1, 1989?

A. I refuse to answer it unless you let me clarify it.

Q. You will answer my questions, please. Did you or did you not turn yourself in approximately 10 days later?

A. When I found out there was a warrant issued, yes, sir.

MR. BACH: I have nothing further.

THE COURT: Do you have any further questions of the witness, Mr. Baehr?

REDIRECT EXAMINATION

BY MR. BAEHR:

Q. Let me be clear about this. When was it that you discovered that there was a warrant issued?

A. I had an attorney call in for me, the one who appeared for me originally. I forget what his name is right now. The Friday prior to myself turning – I turned myself in, because I kept hearing on the news that there was another party being sought for questioning, and I wasn't just going to come up and talk to somebody, because it's not what I do. I don't talk to the police if I don't have to.

Q. So you –

[276] A. But he informed me later on that evening that there was a warrant issued for Joseph Neil Williams for possession of a firearm. He asked me what I wanted to do. I told him, "Make arrangements for me to turn myself in Monday morning at 9:00," or whatever it was, I can't answer –

Q. So you consulted an attorney in order to negotiate a surrender?

A. Yes, sir, because up until that time, I knew not of any warrant being issued, up until the Friday before I turned myself in. All I knew, according to what was going on, was that they were looking for the other person there for questioning; and like I say, I don't – you know, if you want to talk to me, you've got to get a –

Q. Okay, that answers the question. And then you did, in fact, surrender May 1st.

A. Yes, sir, immediately, without any problems.

Q. And that was negotiated through counsel?

A. Yes, sir. I turned myself in to the man sitting next to the district attorney right there.

Q. That would be Agent Harding?

A. Yes, sir.

MR. BAEHR: Okay. I don't believe I have any further questions, your Honor.

MR. BACH: Nothing further, your Honor.

THE COURT: The witness may be excused.

[277] THE WITNESS: Thank you, sir.

THE COURT: Anything further, then, as to the objections entitled 2 and 3?

MR. BACH: Not for the Government, your Honor.

THE COURT: Mr. Baehr?

MR. BAEHR: No, your Honor.

THE COURT: Do you wish to be heard further on your objections and any argument, Mr. Baehr?

MR. BAEHR: I take it, from Mr. Williams' testimony, that it is no longer in dispute that he was present April 16th. I take it that it is still in dispute whether he removed a revolver from a desk at that point. I don't know that it's clear from Mr. Harding's testimony that that's what happened. It seems to me that he overheard some conversations about a .44, and Mr. Williams has testified that someone else had also brought a .44 magnum over, and that that was the weapon that was being discharged. I take it that that's still in dispute. As to the statements that were made, there is no question that the statements were made. The question is what his intention was. I take it that is still in dispute.

THE COURT: Mr. Bach?

MR. BACH: I think, your Honor, it's basically a credibility issue as far as the revolver goes. Agent Harding testified that the confidential informant said that they went back into the trailer, and the Defendant took the revolver out [278] of the desk drawer, which is where it was found two days later – or four days later, rather, and that he made reference to it as his revolver, not that it was somebody else's gun that they were talking about at that time. As far as the DEA agent threats go, I think once again here, Mr. Williams' testimony doesn't make any sense. It wasn't, according to Agent Harding, a conversation simply about current events or what was going on in South America at that time. The Defendant was making specific references and threats concerning what would happen in the event that somebody told on him or informed on him to law enforcement authorities, and that was the context in which those statements were made.

THE COURT: The Court finds that on April 16th of 1989, the Defendant, Joseph N. Williams, did advise that the revolver was his own, and that it was in his desk at that time in the bus in which the informant was also located; and further, that on at least several occasions, the Defendant did threaten the undercover agent and his family in the event that Williams were to be arrested. The Court further finds that he did make reference to the DEA agents floating in puddles, and the fact that they had a $25,000 price on their heads in Peru. The Court believes that the language, as suggested by the Defendant from the witness stand, can be no other than threatening in nature, and does indeed suggest that those

threats were made on more occasions than the one occasion to which he [279] has previously referred. The Court believes that there were general threats to do injury to the agent and to others.

The next relates to finding number – which we will mark as 4. That appears to be the paragraph 24 of Page 4 in which a juvenile delinquency offense is ascribed to another person. Mr. Bach, do you wish to respond?

MR. BACH: I have nothing to offer on that point, your Honor, other than to emphasize that according to the probation officer's report, this offense has shown up in previous presentence reports, and the Defendant has nothing other than his conclusory statement to contradict that at this point.

THE COURT: This being a juvenile offense happening in 1963, the Court will not consider the offense when imposing sentence in this matter. The next relates to number 5, paragraph 5 of Page 4, the assertion of the Defendant that this is a felony rather than a misdemeanor. Anything from the Government in response?

MR. BACH: Nothing, your Honor, beyond what is needed on it.

THE COURT: Mr. Baehr?

MR. BAEHR: I have not been able to locate primary records from Los Angeles, California. I don't know what California law on that point was at the time. It could be either way, and I have no way to determine without viewing the [280] primary record. I haven't been privy to the prior presentence reports.

THE COURT: Nor has the Court. However, the Court will accept the statement of the probation officer as it concerns this matter. The probation officer, having previously examined the previous presentence report, indicates that this was a felony conviction. There is nothing presented to the contrary. The Court will find that the unlawful taking of a motor vehicle on or about August 6, 1966 wherein the Defendant was sentenced to one year in the county jail and three years formal probation, was a felony. The next, then, relates to objection number – I believe 6 at paragraph 27 at Page 5. The Defendant asserts this case was reduced from a felony to a misdemeanor. The previous presentence report indicates that this information was verified. The Defendant has presented no evidence to the contrary. We're talking now about paragraph 27, I believe, Page 5. Was that the theft under $5, Mr. Baehr?

MR. BAEHR: I believe that the probation agent has made a typographical error. My original objection refers to item number 26.

THE COURT: All right, the forgery.

MR. BAEHR: The forgery.

THE COURT: All right. I'll hear anything you may have in addition to that. Yes, you did assert that that case was reduced from a felony to a misdemeanor. That's paragraph [281] 26.

MR. BAEHR: My client's memory is that it was a misdemeanor. Again, I have no way to determine one way or the other, without referring to the primary records in Los Angeles.

THE COURT: Mr. Bach?

MR. BACH: I have nothing to add on that point, your Honor.

THE COURT: The Court, in this instance, will also advise that although the probation office apparently refers to paragraph 27, the objection is to paragraph 26 at Page 5, and the response being that the previous presentence reports indicate that this information was verified, that the Defendant has presented no evidence to the contrary. The Court will accept the fact that a forgery for which a sentence was to three years on June 2 of 1967 would be a felony, and will so find.

We then come to – I believe your next objection is to item number 30, which the Court will call number 7 in paragraph 30 at Page 5. Mr. Baehr, anything on that?

MR. BAEHR: The nature of the dispute, I guess, is when the offense commences. The guidelines aren't terribly helpful as to when the offense commences, and that's the dispute. If the offense commenced in October, it's within the 15 years. If the offense commenced in – at any point after November 28th, then it would be beyond the 15 years. My [282] argument would be that the offense commenced in April; that although the investigation may have commenced in October, that it wasn't until well after November that the alleged offense occurred.

THE COURT: Mr. Bach, do you wish to be heard?

MR. BACH: Yes, your Honor. I think from the trial in this case, the Court may recall the testimony of

John Anties and Harold Larsen, that they saw the Defendant in possession of Government Exhibit No. 1, the gun that they identified, as early as October 1988. Witness Keith Dolson testified that he saw the Defendant in possession of that firearm, which had the cartridge removed from it when he saw it, during the summer of 1988. There is also the affidavit, which is part of the record in this case, which was filed with the Court in order to obtain the search warrant that was executed in April, and which affidavit the – Agent Harding relates his conversations with the confidential informant, who told him that he saw the .44 caliber revolver in the Defendant's possession in the bus, which was his residence, during October of 1988.

In the commentary to Section 4A1.1 of the sentencing guidelines, it's the commentary to number – both number 4 and 5 on Page 4.3, it talks in terms of the instant offense being "any relevant conduct," which should be considered as the starting point. Also in some of the illustrated examples to the supplement to the guidelines which were issued in December [283] of 1987, Example G7 is – talks about a fraud offense that was committed from November 5 of '87 to December 20th of '87, and the Defendant having been convicted for possession of stolen property resulting from an offense committed on December 6th of 1978, and thereafter being sentenced on March 2 of 1979.

The commentary specifically states here that two criminal history points are to be added because the date of the commencement of the instant offense refers to the earliest relevant conduct, and it refers back to those two application notes that I just cited to section 4A1.1. It's the Government's position that the earliest relevant conduct

in this case were the dates on which the witnesses saw the Defendant in possession of the firearm, which could, according to Mr. Dolson, have been in the summer of 1988, or according to Mr. Anties, Mr. Larsen, and the confidential informant, at least as early as October of 1988.

The Defendant was paroled from that 1971 conviction on November 28th of 1973. That's what is stated in the presentence report. If he had the gun as early as October, or even earlier than that, of 1988, he would have been within – the earliest relevant conduct would fall within the 15 year period; and therefore, that conviction counts for the full point total accorded to it by the presentence – or the probation officer. I would also add that on Page 4.7 of the sentencing guidelines, there is a paragraph number 6 to the [284] commentary under "invalid convictions." Now, this is assuming that the earliest relevant conduct would not put the offense within the 15 year period.

Even if it didn't fall within that 15 year period, as stated in the last sentence under Page 4.7, it states, "Nonetheless, any conviction that is not counted in the criminal history score may be considered pursuant to Section 4A1.3" – that's the section concerning departures – "if it provides relevant or reliable evidence of past criminal activity." So certainly the Court may use this conviction as a means of departing upwards, if it finds that the relevant conduct did not fall within the 15 year period, or conversely, the Court could add the criminal history points if it finds that the earliest relevant conduct in this case, the Defendant's possession of the gun in the fall or summer of 1988 were within 15 years of his date of release from prison.

THE COURT: Mr. Baehr, anything further?

MR. BAEHR: I'll withdraw the objection, your Honor.

THE COURT: The court does believe that – initially the objection caused the Court some concern, and the Court did research it as perhaps as thoroughly as has counsel. I believe that in light of the withdrawal of the objection, that it need not be necessary to make further comment by the Court, but I think an explanation is appropriate. At 4.2 of the sentencing guidelines – Page 4.2, which is Section 4A1.1(a), it says, "A [285] sentence imposed more than 15 years prior to the Defendant's commencement of the instant offense is not counted, unless the Defendant's incarceration extended into this 15 year period."

Now, having that before us, and having before us also the explanation at Page 4.5, any prior sentence of imprisonment exceeding one year and one month that was imposed within 15 years of the Defendant's commencement of the instant offense is counted. The Court looks, then, at the offense, and the offense occurred May 8th of 1971. The sentence was June 17 of '71 to five years incarceration. Defendant was paroled to Bexar County, Texas, on November 28 of 1973. We then look to what is the commencement of the offense. The court believes that the explanation previously provided to us by the United States Attorney is the appropriate one.

The Court has examined its notes as it relates to the following witnesses. One, John Anties of Sauk City, he

saw the Defendant in possession of the revolver on October of 1988, and he described the single action .44 magnum at that time. We have the testimony of Harold D. Larsen, who advised that it was fired over three years ago, a .44 caliber revolver, that he did see the Defendant with that gun in September and October of 1988; and finally, Keith Dolson, he talks about a period July of 1988 to April of 1989. He saw it even in a disassembled condition on two occasions prior thereto, this September or October of 1988. This was information that went to a jury. [286] The Court is of the opinion that the date of the indictment of the offense is not that date from which the 15 years is counted. The Court believes that there should not be the doubt, which there apparently is. But the statement, "A sentence imposed more than 15 years prior to the Defendant's commencement of the instant offense is not counted, unless the Defendant's incarceration extended into this 15 year period.

The offense, then, that the Court finds to be appropriate is either September or October of 1988, the Court also examining the affidavit to the complaint which is on file, indicating October of 1988. The sentence continued into that 15 year period, the incarceration thereof; and the fact is that the release being on the date as previously stated by the Court is in the 15 year period, November 28th of 1973. And so by at least two or three, and perhaps even five months, it is within the 15 year period. Accordingly, the objection was appropriate to discuss, but after examining the law relating to it, the Court finds it is without merit and should, as counsel recognized, be withdrawn. There is the three points for that offense, and the Court so finds.

The next, then, relates to number 8, in which the Defendant asserts the sentence was reduced at paragraph 33. I believe we're on the right one. We're having difficulty with numbers, but this is 33 in which the Court does accept the Defendant's assertion that the sentence was reduced on a motion [287] to one year, and that two points should be added to the criminal history rather than three points. And so accordingly, with those points being reduced, the criminal history to that point would be nine, we then have the additional criminal history computation, which has been brought to the Court's attention. Is that – has the Defendant's counsel been advised of the additional one point for the conviction January 7 of 1988, driving under the influence?

MR. BAEHR: We see that in the parole officer's addendum, yes, and my information is that that's correct.

THE COURT: There would, then, be a one point added for that, and the criminal history, then, would apparently be the result of 10. However, I will hear that further argument that counsel may have as to the score of 10, which would place the Defendant in a criminal history of Roman Numeral V, because that is another objection, which if indeed the one additional point of driving while under the influence would not have been added, it would have been 9. It now appears to be back to 10 again. Mr. Baehr?

MR. BAEHR: The corrections – it seems to me, yeah, that that's the net effect of the result on the objections. We got the one point on the reduction to one year. There is this other sentence that I was not aware of at the time. If we have withdrawn our objection on number 7,

that results in another three points there, so the net effect is a criminal history [288] score of 10.

THE COURT: The calculation which had previously changed and which was previously objected to, would appear to be the score criminal history category of 10 points for Roman Numeral V. The Court would advise – all right. Let's then relate to number 10 – objection number 10, which is at paragraph 46, Page 7, in which the Defendant denies he ever threatened to kill his family. Do you have anything further on that, Mr. Baehr?

MR. BAEHR: Apparently my client wishes to be heard on that.

THE COURT: You've previously been sworn, Mr. Williams. Do you deny that you ever threatened to kill your wife and family?

MR. WILLIAMS: Your Honor, the words that were said there were in anger when we were arguing. Her and I were arguing back and forth. It wasn't – it was one of those things where you just – you know, you're letting your absolute aggravation known that I just wished I could (indicating), but you're just aggravated. You're not actually making a threat.

THE COURT: Mr. Bach, do you wish to respond?

MR. BACH: No, I have nothing, your Honor.

THE COURT: I don't plan to consider those comments when imposing sentence. I'm disregarding any reference to that particular section.

[289] MR. WILLIAMS: I really wouldn't – you know, I mean, I love my wife and kids. You know, as far as that goes, I wouldn't put that on their heads, man.

THE COURT: The next, then, is the acceptance of the objection in which the Defendant advises that at paragraphs 52 and 53, Pages 8 and 9, that a more accurate characterization of his technical college courses and self-employment would be to describe them as training and self-employment as an electronic service technician, rather than an appliance repairman; and the Court will accept the term "electronic service technician" rather than the previous statement which this is used for substitution. We then reach paragraph 62, which is objection number 12. The Defendant objects to this paragraph as a misstatement of the law.

Now, before going any further, I believe we are now in the area of legal disputes as well as factual disputes. I'd rather resolve those legal disputes at this time as well. We're talking, at this time, about factors that may warrant departure. You'll recall that under 5K2.0, pursuant to United States Code 18, Section 3553(b), the Court may consider aggravating or mitigating circumstances and impose a sentence outside the guidelines. It suggested an aggravating factor is the adequacy of the Defendant's record, Section 4A51.3. I wish to specifically advise as to that objection. That at 4.7 of the guideline book, "Any conviction that is not counted in the [290] criminal history score may be considered pursuant to Section 4A1.3 if it provides reliable evidence of past criminal activity."

The Court notes that that statement is available, and also at Page 4.8, "Adequacy of criminal history category.

Prior sentence is not used in computing the criminal history. Such information may include, but is not limited to," and so it appears that there can be that consideration. Now, the objection, as I understand it, is that although the Court may impose a sentence outside the guidelines, if there is reliable information that the criminal history score does not adequately reflect the seriousness of the Defendant's past criminal conduct, that's recognized. However, Mr. Baehr, on behalf of the Defendant, alleges the report does not provide such information. Is that your understanding of the Court's summation of your objection, Mr. Baehr?

MR. BAEHR: Yes. As I understand it, when the guidelines talk about the adequacy of the criminal history, it talks about reliable information which was not taken into consideration in computing the criminal history score, and the examples would be civil judgments, administrative judications, tribal offenses, or foreign offenses that were not considered. We don't have any of those alleged here. We don't have any aggravating factors under Section 5K2.0 such as death, physical injury, etc. None of those were alleged. So it seems to me [291] that there is to be a departure, that we have to have some other information that has not already been put before the Court, and I don't see that anywhere in the presentence investigation report.

I don't believe that it was the intention of the drafters of the sentencing guidelines to say that you can calculate a criminal history score, and then you can go back and you can pull back into consideration, the sentences that were excluded because they were beyond the 15 year limit. They're talking about other information, and I

believe that when they're talking about, as examples, prior sentences, or they're talking about cases that were consolidated and perhaps a concurrent sentence was imposed, or cases that there was a lenient disposition because of cooperation, or something on that order, that that might be considered. But again, I don't see any allegation of any of those sorts of cases.

THE COURT: Mr. Bach, do you wish to be heard?

MR. BACH: Your Honor, I interpreted the statement in the – by the probation officer in the presentence report as a reference not so much to the convictions that were not counted as to many of the arrests of the Defendant that were not – either did not, for one reason or another, result in conviction, or where the charges were dismissed for one reason or another, and we had referenced to the multiple arrests of the Defendant. I have – what I've prepared, I've copied the [292] Defendant's criminal record, which I'd submit to the Court as Government Exhibit 2. There were a lot of arrests on there for violent crimes, specifically some assault.

This third one down in the first page is assault with a deadly weapon, from 1967. There is an attempted rape, 1969 on the second page, in San Antonio, Texas. There is a charge for unlawfully carrying a knife, which is down below that on the second page. On the third page, there is an arrest for attempted murder, which was apparently changed afterwards to assault – aggravated assault with a deadly weapon, 1978. There are a number of arrests here for violent crimes that did not factor their way into the criminal history computation. And on Page 4.9 of the

guidelines, under Section 4A1.3(e), it does include, or allows the Court to consider prior similar adult criminal conduct not resulting in a criminal conviction, and these would be precisely the types of things that would seem to be included under that category.

THE COURT: That may very well also relate to your objection at number 63, Mr. Baehr, in which you've advised the Court that you believe the Defendant's arrest record does not reflect 20 arrests and – strike that. That's the response. You also suggested, in your objection, that there was your concern with the number of arrests, and that there should not be that consideration by the Court. So I'm going to look at 62 and 63 together. Do you wish to be heard further on the [293] presentation by the United States Attorney in this matter?

MR. BAEHR: Yes, your Honor. On Page 4.9, in the discussion here under – the first paragraph under subdivision E, the very last sentence says, "However, a prior arrest record itself shall not be considered under 4A1.3." I think that the dispute as to the number of arrests here arises, because it appears to me it's because – excuse me. It appears to me that the parole agent has counted entries on a rap sheet rather than counting arrests. I don't think that his answer meets the objection. He simply reiterates his position without explaining any of the discrepancies that I've pointed out in my objection.

For example, the very first two items on the rap sheet, both occurring in Long Beach, and the second one in Los Angeles. The first one is dated August 7th, 1966. The second is August 8th, 1966. The first one is investigation of grand theft auto. I take it that's what GTA stands

for. The second was unlawful taking of a motor vehicle. The disposition on the first one is apparently a release. The second one resulted in a suspended jail sentence and probation. If I understand what the probation agent is doing, he's counting multiple entries as multiple arrests, when it should be apparent that this is a single arrest. I don't think there's any suggestion that these were two separate thefts, or that these were two separate offenses. It's a single offense which was initially [294] investigated as grand theft auto and finally disposed of as an unlawful taking of a motor vehicle.

The second arrest would be the one for assault with a deadly weapon in Los Angles. Moving onto the next two entries, one in Southgate, California, another in Los Angeles, California. We look at the disposition on the one in Southgate, it says, "Released to Los Angeles Sheriff's Forgery Detail, who will file a complaint." The second entry immediately after that is, "Forgery, six months criminal – six months" – I don't know what that is – "and three years probation." "Three months county jail," I guess, "and three years probation." Again, it's apparent that what is happening here is that this is a single arrest which was initially charged as burglary and forgery, disposed of as a forgery. Not two arrests, one arrest.

The next item is Los Angeles, California. That appears to be one arrest. There's another one August of '68. That appears to be his fifth arrest. Turning to the next page of the rap sheet, both of the first two entries are in San Antonio, Texas. The first one is dated December 13th, 1968. It's described as shoplifting. The second one was theft of less than $5. That is a single arrest. That would be his sixth arrest. The next would be in San Antonio, Texas,

an attempted rape. That's his seventh arrest. Unlawfully carrying a knife in San Antonio, Texas, would be the eighth arrest. The next [295] two in Portland, Maine on August 13th, that, again, is a single arrest. The last two entries on that page, Bexar County Jail, San Antonio and then Department of Correction, Huntsville, Texas, that is a single arrest.

Moving onto the third page, it initially appeared to me that these first two items were separate events. Mr. Williams informs me that they're a single arrest. The Austin, Texas, and then the Department of Corrections, Huntsville, Texas, and that seems to make some sense; that we have an entry here from Austin, Texas, charged as attempted murder. Apparently that was disposed of with a two year sentence for assault with a deadly weapon. That's a single arrest. That would be the 11th arrest. The next item, terroristic threat, would be the 12th arrest. The next two items in South Dakota – Deadwood, South Dakota, and Sioux Falls, South Dakota, that would be the 13th arrest. We have the last entry on that page, Deadwood, South Dakota, a DWI. That would be the 14th arrest. The last item is simply an amendment of the sentence on the arrest for interstate transportation of a firearm on the previous page.

So we have 14 arrests, not 20. Not counting the – because it doesn't appear in here, the conviction for DWI in 1988, that – adding that in [sic] would make it 15 arrests, not 20. It seems to me that what's happening here is again simply counting entries without attempting to determine whether any of these are duplicates or not, and I'm concerned that there's an [296] unrelenting tone to this report that in no cases is this man given the benefit of

any kind of doubt at all. It seems to me that it's clear that what's happening here is simply counting entries and not counting arrests, and there has been no principal effort to meet my objection.

THE COURT: Anything further, Mr. Bach?

MR. BACH: I counted the number of convictions on the rap sheet as well, your Honor. I come up with 15. I guess that the point isn't whether it's 15 or 16 or 20. I think the point is whether or not the Defendant's criminal history score, as calculated under the guidelines, adequately represents the seriousness of his criminal past; and I think that all the presentence report indicates is that this is a factor that the Court may consider, and it's one I think the Court should very well consider in this particular case, because as stated in the guidelines immediately above the sentence that Mr. Baehr quoted, "The Court may, after review of all the relevant information, conclude that the Defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines." We have, in this instance, a number of arrests and involvement with the law that did not factor themselves into the guidelines; and that is, I think, a basis upon which departure could be made.

THE COURT: The Court believes that it does have the [297] opportunity to consider an upward departure based upon the information which it has been provided in the presentence report and in Government's Exhibit No. 2. The Court believes, however, that these are not to be factored into the offense level and the criminal

history level, but are placed in the report to advise the Defendant and the Government of those mitigating circumstances, or those aggravating circumstances. In this instance, aggravating circumstances, which may require the guidelines to be departed.

The Court does, in this instance, note the objections, notes that the Defendant has acknowledged that of 15 arrests, records indicate the Defendant was released, or the case was dismissed in two cases; and that the remaining cases, there may not be the complete information on disposition, but that there were clearly convictions in the following: There was a conviction beginning on 11-16 of 1966, the unlawful taking of a motor vehicle. That is the first felony for which there was a conviction. On April 18th of 1967, the offense was forgery. The sentence on June 2 of '67 was that of forgery. This was also a felony conviction. The Court believes that items 27, 28 and 29 are not, under any circumstances, to be considered if we follow the guideline information which has been provided to us. As examples of offenses which are not to be considered, one of which is public intoxication, we understand that one also is the transfer, or extradition, perhaps as has previously been [298] referred, and also the nature of the fine and the two days in jail for item number 27 would be an offense which would not be considered.

However, there has been the felony offense at item number 30. There has been the felony conviction at 31, at which time we have four felonies, together with the possession of firearm, and item number 33, it appears that there are five felonies, that there is – there are two other offenses which have – one of which has recently been

added for driving under the influence on January 7 of '88, which is apparently a repeat of similar conduct on November 20 of 1980. All in all, that apparently is the conviction record. The Court believes that the information as provided by the Court to determine whether or not departure is appropriate in a matter such as this, a prior arrest record, of itself, shall not be considered. But the Court may, as Mr. Bach has advised, after review of all the relevant information, conclude the Defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category. The Court, in considering the sentence, and after argument, will impose that sentence which it believes to be appropriate as a result of the objections which have been filed, the hearing which has been held in this matter, and the Court's full review of all of those records which have thus far been provided. Are there any further challenges which should come to the Court's attention?

[299] Mr. Baehr?

MR. BAEHR: Not that I'm aware of, your Honor.

THE COURT: Mr. Bach?

MR. BACH: No, your Honor.

THE COURT: Mr. Williams, do you know of any further objections or challenges which should be made to the presentence report?

MR. WILLIAMS: No, sir.

THE COURT: The Court, then, at this time will provide the conclusions as to the appropriate offense

level. There appears to be no dispute as to the appropriate offense level in this matter, which has been set forth in the presentence report. The Court determined that to be one of nine. The criminal history, the Court having reviewed all of the information relating to that, would determine that the criminal history points in this matter are 10, with a Roman Numeral of V, as is suggested by the sentencing guidelines. The Court, at this time then, makes that announcement, advising then that the guidelines for an offense level of 9 and a Roman Numeral V criminal history category is 18 to 24 months. I'll hear those arguments relating to the conclusions announced by the Court which have not already been made. Mr. Bach?

MR. BACH: Nothing further, your Honor.

THE COURT: Mr. Baehr?

MR. BAEHR: Nothing further your Honor.

[300] THE COURT: The Court, then, will recognize Defendant's counsel for remarks on behalf of the Defendant as to that sentence which may be imposed. You have, of course, been made aware of the departure which may be appropriate in this matter, based upon the insufficiency of the criminal record, and I would be happy to have you take that into consideration when making your remarks, if you believe that to be appropriate. But in any event, this is the usual time when arguments are made on that sentence which may be appropriate. I'll first call on Mr. Baehr at which time I'll call then on Mr. Williams, and then on Mr. Bach. Mr. Baehr at this time.

MR. BAEHR: With respect to departure, there are two felonies that the Court has indicated were not taken into consideration in the criminal history score which the Court finds reliable information as to a basis for departure, and that would be the unlawful taking of a motor vehicle in Los Angeles in 1966, and the forgery in 1967. All the other felonies that have been discussed have already been considered in the criminal history score. The first one was at age 20, the second at age 21. Both are nonviolent offenses. I don't think that those, by themselves, would justify a departure. There have been a number of appalling allegations about Mr. Williams and about his behavior during the course of the trial, again, this morning during the course of discussing the objections to the presentence report and in the discussion of the [301] Defendant in the presentence report.

There's been a discussion of threats, of threats to Mr. Harding, threats to other people, reference to violent behavior throughout his life, drug behavior, addition to drugs, alcohol abuse, a variety of factors. And I suppose that those are all factors that the Court ought to take into consideration, but again, I'm concerned by not so much what's been said as almost an attitude towards Mr. Williams.

A couple of times during the trial, and even during this morning's sentencing hearing, we find Mr. Bach laughing at Mr. Williams. It seems as though that the report here doesn't miss any opportunity – doesn't miss any opportunity to cast Mr. Williams in a bad light; and I m at least as upset by the unrelenting tone that the prosecution has taken in this case, and that the presentence investigation report takes towards Mr. Williams.

This is not a highly educated man. This is not someone who has come from a good background. This is someone who has – from his family history, from his family ties, himself, comes from an appalling background; and I suppose it's no longer fashionable these days to attempt to excuse the behavior of a Defendant by decrying his background, but it seems to me that some consideration should be given to that. I would recommend a sentence of 18 months. That puts him at the bottom of the guideline range.

The criminal history score is 10. I think that the [302] felonies that we're taking into consideration here are so long ago – are themselves nonviolent offenses, that it doesn't warrant the departure here, and I think that if the scale is 10, and if that puts him in just over the limit from category four into category five, that it makes some sense to impose a sentence on the bottom end of that range, which would be 18 months. I'm not going to attempt to excuse the statements that Mr. Williams has made. I'm not going to attempt to excuse the prior record. It's certainly lengthy. It certainly demonstrates a long history of involvement with law enforcement authorities in a number of jurisdictions, but I don't think that the information we have here warrants departure.

Finally, I would draw attention to the fact that it has been some long period of time since he has had any recent criminal activity. His last conviction was in, I believe, 1980. He was released in 1981, and he has been eight, almost nine years without any criminal convictions, without any law enforcement involvement, and I think that deserves some consideration.

THE COURT: Mr. Williams, do you wish to be heard?

MR. WILLIAMS: Your Honor, I can't excuse myself for the things I've done in the past. They were wrong, and things that I was convicted of I pled guilty to, and I was guilty of, and I was wrong, I can only ask that the Court – or I can only say –

[303] (Technical difficulty – 30 seconds of hearing not recorded)

MR. WILLIAMS: . . . than what you're going to be, and I'll try and walk out of here like a man and do my time, and when I'm released, come back out into the world and see if I can't be a productive citizen instead of a piece of trash. Thank you.

THE COURT: Mr. Bach?

MR. BACH: Your Honor, the sentencing guidelines speak in terms of departures. If I could quote the paragraph directly, "In cases where the Defendant's past criminal conduct, or the likelihood that the Defendant will commit other crimes indicates that a departure may be warranted in a particular case." I think in Mr. Williams' case, we have clearly a criminal record of at least 15 convictions, dating back to 1966. He is before the Court on this occasion for the exact same offense that he was convicted of committing in 1981, a felon in possession of a firearm. This is not the typical type firearm case where somebody who has a felony conviction comes in, and the prior felony having been for some unrelated type of conduct. This person that's before the Court today has been convicted of the exact same offense in the past.

Contrary to Mr. Baehr's statement, it seems to me that Mr. Williams' last involvement with the law was on January 7th of 1988, when he was convicted of drunken driving. If we take that into account, we have a record of criminal conduct for [304] this man which is virtually uninterrupted, with the exception of a few years in the mid-'80's, from 1966 until today. There was one other interruption in the 1970's which was reflected by the time period that Mr. Williams spent in jail. If that doesn't indicate a likelihood that this particular person is going to get involved and has been involved in criminal conduct throughout his entire life, I don't know what does.

Mr. Baehr has made reference to the, I guess, overaggressive posture, as he perceives it, of the Government in this case and of the probation office, and the fact that, or at least as he perceives it, Mr. Williams hasn't gotten a break in this case. I don't know what breaks an individual who has been convicted of that many offenses is entitled to. It seems to be that he's gotten his breaks in the past when, for one reason or another, individuals, complaining witnesses haven't shown up to testify in serious felony cases. For one reason or another, arrests did not result in convictions. I think Mr. Williams has gotten all the breaks that the legal system – that he can expect to obtain from the legal system to date. If Mr. Baehr is offended by my particular attitude in this case, I guess it's my nature that when an individual takes an oath to tell the truth and then gets before the Court and gives testimony which is nothing other than a bald faced lie, it's my nature to smile instead of scream at him, and that was my reaction in this case.

[305] His testimony was not found credible by the Court, and it directly conflicted with the testimony of the agent who was investigating this particular case. I would recommend his sentence, at the very least, at the high end of the guidelines for Mr. Williams, in recognition of his past criminal conduct and his flagrant disregard of the law for the second time in which he has been found in possession of a firearm, and I would strongly urge the Court to consider departing above those guidelines in recognition of his lifetime of criminal conduct.

THE COURT: Anything further, Mr. Baehr?

MR. BAEHR: No, your Honor.

THE COURT: The Court will suggest at the commencement of its imposition of sentence that it is of the opinion that the criminal history points of 10, Roman Numeral V, do not adequately set forth the criminal history of this Defendant. The Court is always hopeful that the comments of a Defendant made to this Court are sincere, and that there will indeed by the turnaround, but there's nothing in the record to demonstrate that it adequately sets forth the criminal history of this Defendant. The record is replete with convictions, and even if we count to but five felony convictions, the Court has the belief that the 10 points assessed is insufficient for the five felonies, two of which are outside the 15 year parameters.

The number of arrests, there is no question. The Court, too, is well aware of the fact that a prior arrest record [306] itself shall not be considered. But in reviewing all of the relevant information, the types of offenses, the criminal conduct in which this Defendant has been

involved throughout his life, disregarding the juvenile adjudications, of course, but looking at that record, looking at the two felony convictions which are not considered by this Court, the Court is of the opinion that there must be added an additional three points for the criminal history. It must adequately demonstrate that the record before this Court is not sufficiently resolved by the sophisticated system suggested by Congress and the sentencing commission when we put the round pegs in the round holes, and the squares in the square ones.

I think that anyone looking at this record, together with Exhibit No. 2, must, by the very weight of it, make the determination that the assessment of 10 does not, in any way, adequately suggest to the Court that the criminal record has been sufficiently ventilated; and accordingly, I'm going to assess an additional three points, placing that at 13. That is a departure which the Court believes it can make. The Court believes that it can use certain convictions in computing the criminal history category which have not previously been used when they are numerous in nature, and it does believe it can address itself to the Defendant's criminal conduct when it has been the subject of so many arrests which have been brought to this Court's attention. I think we must address it, the entire [307] matter, and perhaps you don't do it with numbers, but this Court is going to do it with three.

The Court believes, then, that the criminal history category is a Roman Numeral VI, that the offense level is 9, and that the sentencing guidelines are 21 to 27. The concern the Court has, of course, is that this has been done before. The sentence which the Court is now about to impose is addressed to the same conduct for which this

Defendant was previously subjected. Possession of firearm by a felon, Lawrence County, South Dakota. At that time, he was sentenced at the age of 34. He comes before this Court at 42 for the same thing. The history that he's had with the aggravated assault with a deadly weapon in Travis County, when he was 32 years of age as well, would suggest that there's something about deadly weapons that this Defendant finds to be appropriate for their use.

The Court will further suggest that in the presentence report, Mr. Williams reveals a person who has threatened violence, and has threatened violence in this particular situation, to an undercover agent. Your past record, sir, suggests that you are capable of violence; and in view of this, I believe that you should be sentenced at the top of the guidelines. The present offense is the second time that you've come before a federal court for unlawful possession of a weapon. It's the Court's hope that you don't return for this [308] offense or any other offense; and there's light at the end of the tunnel, after your recent statements to the Court, that you do plan to come back and be a substantial and helpful citizen in the future.

Accordingly, the Court accepts the guideline calculations as submitted by the probation office and has selected a sentence at the top of those guidelines determined by this Court to be appropriate after departing from the criminal history, and making it a Roman Numeral VI category to more accurately reflect the sufficiency of this Defendant's record. The purpose of this sentence is to promote personal and general deterrence, hopefully more personal deterrence then general deterrence.

As to the one count indictment, it is adjudged that the Defendant be committed to the custody of the Attorney General or his authorized representative for a period of 27 months, to be followed by a three year term of supervised release. As special conditions of supervised release, it is ordered that the Defendant, one, refrain from possession of firearms. Two, register with local law enforcement. Three, refrain from associating with persons who use, possess, distribute drugs, and refrain from the excessive use of alcohol, and refrain from all illegal drug usage. Submit to a urinalysis or other testing to test for drug usage. Further, to allow for the search of the residence and of the property under his control, [309] and allow for seizure of contraband, and to share financial information as directed by the supervising United States probation officer.

It is further adjudged the Defendant pay a $50 criminal assessment penalty, which is due and payable immediately to the United States Clerk of Court for the Western District of Wisconsin. The Court finds that the Defendant's financial and employment history indicates that a payment of a fine, or the payment of cost of incarceration or supervision would be unduly depreciating of his ability to support himself, and accordingly, will not be ordered.

Now, we have no longer a Rule 35 as we knew it prior to sentencing guidelines; and so I would advise Mr. Williams that the affidavit which refers to Rule 35 which he has filed with this Court cannot be used to so implement a Rule 35, and that's the reason that after announcing that sentence which this Court believes to be appropriate and explaining the reasons therefore [sic], the

Court, at this time, addresses both counsel as to whether they know of any reason other than those already argued, as to why the sentence as announced by the Court should not be imposed. Mr. Bach?

MR. BACH: I have no such reason, your Honor.

THE COURT: Mr. Baehr?

MR. BAEHR: No reason other than what's already argued, your Honor.

[310] THE COURT: The Court then orders the sentence imposed as stated, and the Court at this time will advise the Defendant of his right to appeal, and his right to appeal the sentence. You're also informed, Mr. Williams, that where appropriate, you have the right for leave to appeal informa pauperis. The Court wishes to examine its notes, as I'm sure counsel may care to examine theirs to determine whether or not there are further items to be brought to the Court's attention. The Court being of the opinion that the matter has been appropriately articulated, will ask if there's anything further to come before the Court at this time. Mr. Bach?

MR. BACH: Not for the Government, your Honor.

THE COURT: Mr. Baehr?

MR. BAEHR: Yes, sir, one item. When counsel was appointed for Mr. Williams, I believe Magistrate Groh ordered him to contribute to the costs of counsel.

THE COURT: $3,000, if I recall.

MR. BAEHR: Something like that.

THE COURT: You ask that that order be vacated?

MR. BAEHR: Yes, I am, your Honor.

THE COURT: So ordered. The Court had meant to do that. I'm happy that you brought that to the Court's attention.

MR. BAEHR: Thank you, your Honor.

THE COURT: If I recall at the first hearing, the – [311] I don't know if that was the amount or not, but I do recall that there was an order for contribution towards attorney's fees, and I believe it was appropriate at the time. I believe that based upon the record we presently have before us, which has not been contested, that there is an indigency here which would not allow that type of a contribution towards attorney's fees. And any contribution that may have been made will be vacated. I'll hear your request for reconsideration, Mr. Bach?

MR. BACH: The Government has no objection to that, your Honor.

THE COURT: Anything further?

MR. BACH: Not for the Government.

THE COURT: Mr. Baehr?

MR. BAEHR: Mr. Williams indicates that he intends to pursue an appeal –

THE COURT: Your obligation, then, is to file the appropriate IFP once he has been allowed to proceed, of course, and file the appeal, and then the appellate counsel will be appointed by the Court of Appeals.

MR. BAEHR: Okay. So are my obligations discharged once I have filed the notice and – Okay.

THE COURT: Yes, sir.

MR. BAEHR: Because in view of his motion with regard to ineffective assistance of counsel –

THE COURT; Well, it's not a motion yet.

[312] MR. BAEHR: Okay.

THE COURT: It's an affidavit.

MR. BAEHR: Okay.

THE COURT: And the fact is that there may very well be writs that he can pursue. There are the appeals, but the fact is, your obligation does continue until his appeal is appropriately and properly filed.

MR. BAEHR: All right, thank you, your Honor.

THE COURT: And counsel will be appointed by the Court of Appeals through the procedures which are to take place. Mr. Bach?

MR. BACH: I have only one concern, your Honor. The Government turned over duplicate copies of tape recordings to Mr. Baehr which were tape recordings of meetings between the investigative agent and the defendant. I understand that Mr. Baehr had hoped to retain those pending the outcome of the appeal, and the Government has no objection –

THE COURT: Well, they will be held in his possession until appellate counsel is appropriately appointed, I would suppose.

MR. BACH: I would only ask that those be turned over directly to the appellate counsel and not released to the Defendant himself. Otherwise I would prefer to turn them over to Appellate counsel myself. They are actually Government property.

[313] MR. BAEHR: I don't believe that you can be denied access to the tapes. The question is whether they're to be turned over to you directly, or whether they're to be turned over to your appellate counsel.

THE COURT: And the Defendant objects to that, and the Court notes the objection. The Court will order Mr. Baehr, as an officer of the Court, to make the transfer of those tapes directly to appellate counsel, whoever that may be, and we can fuss over that with the Court of Appeals as to the direct access which may very well be provided or not provided, but that resolves the matter in this Court.

MR. BAEHR: Thank you, your Honor. Nothing further.

THE COURT: Anything further at this time, then? Mr. Bach, do you wish to bring something further to this Court's attention?

MR. BACH: No, your Honor. There was some concern about the calculation of the points, but I believe the points were correctly calculated by the Court.

THE COURT: Well, you've had that opportunity to make those comments if indeed you believe they are inappropriate. That's the whole reason for the Rule 35 immediately after the sentence. If you do believe there

has been some appropriate miscalculation, I will hear that at this time.

MR. BACH: No, I believe they were correctly calculated.

[314] THE COURT: Realizing that there is the concern with the sentence, do you know of any miscalculation which has been made by the Court in the compute numbers – figures before it, Mr. Baehr?

MR. BAEHR: No, your Honor, I'm not aware of any miscalculation.

THE COURT: Well, if there are, I suppose those will be determined at a later date as well. All right, thank you. Counsel, we'll be then adjourned.

CLERK: All rise. This Honorable Court stands adjourned.

United States District Court

WESTERN District of WISCONSIN

UNITED STATES OF AMERICA

V.

JOSEPH N. WILLIAMS

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89-CR-47-S

Thomas D. Baehr
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[X] was found guilty on count(s) I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Convicted Felon	I

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ , and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

568-62-2676

Defendant's mailing address:

Rock County Jail
200 Hwy. 14E
Janesville WI 53545

Defendant's residence address:

_____

_____

September 19, 1989
Date of Imposition of Sentence

/s/ John C. Shabaz
Signature of Judicial Officer

John C. Shabaz,
District Judge
Name & Title of Judicial Officer

September 20, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twenty-seven (27) months, to be followed by a three (3) year term of supervised release. As special conditions of supervised release, it is ordered that the defendant: 1) refrain from possession of firearms; 2) register with local law enforcement; 3) refrain from associating with persons who use/possess/distribute drugs, refrain

from excessive use of alcohol, and refrain from all illegal drug usage, submit to urinalysis, or other testing to test for drug usage; 4) allow for the search of residence and/or property under his control and allow for seizure of contraband; and 5) share financial information as directed by the supervising U.S. Probation Officer. It is further adjudged that the deferdant pay a $50 criminal assessment penalty which is due and payable immediately to the U.S. Clerk of Court, Western District of Wisconsin. The Court finds that the defendant's financial and employment history indicates the payment of a fine or the cost of incarceration and supervision would unduly depreciate his ability to support himself.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

[ ] at ___ a.m./p.m. on ___.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on ___.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years. As special conditions of supervised release it is ordered that the defendant 1) refrain from possession of firearms; 2) register with local law enforcement; 3) refrain from associating with persons who use/possess/distribute drugs, refrain from excessive use of alcohol, and refrain from all illegal drug usage, submit to urinalysis or other testing to test for drug usage; 4) allow for the search of residence and/or property under his control and allow for seizure of contraband; and 5) share financial information as directed by the supervising U.S. Probation Officer.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be

a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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* These conditions are in addition to any other conditions imposed by this Judgment.

15) You shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any hand gun, rifle or shotgun.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States a special assessment of $ 50.00 .

[X] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

The defendant shall pay a special assessment as to the one-count indictment in the amount of $50.00.

This sum shall be paid [X] immediately.
[X] as follows:

To the U.S. Clerk of Court, Western District of Wisconsin.

[ ] The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The Court accepts the guideline calculations as submitted by the Probation Office. It has determined that a departure is warranted based upon reliable information indicating that the criminal history category does not adequately reflect the seriousness of the defendant's past

criminal conduct or the likelihood that the defendant will commit other crimes. The Court in departing has considered two convictions which were not counted in the criminal history. The convictions for unlawful taking of a motor vehicle and forgery are both felonies and although having occurred in 1966 and 1967, respectively, they nonetheless suggest this defendant's career of criminal activity, unless discouraged, will continue. The Court also has considered the numerous arrests for which the defendant has not been prosecuted. The serious criminal conduct reflected in those arrests, coupled with those convictions not considered in the guidelines, suggest that after a review of all the relevant information this defendant's criminal history is significantly more serious than that of most defendants in the same criminal history category. Accordingly, the Court has added three points to the computation of ten and has determined that this defendant is in Category VI, rather than Category V.

The defendant is a 42-year-old offender with an extensive prior record. This is the second time he has come before the federal court for unlawful possession of a weapon. He has also threatened violence to undercover agents and is capable of violence. In view of his prior extensive criminal record and propensity for further crime and violence, the defendant is sentenced at the top of the guidelines.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

No. 89-3084

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOSEPH N. WILLIAMS,
Defendant-Appellant

JUDGMENT – WITH ORAL ARGUMENT

Date: August 27, 1990

BEFORE: Honorable Harlington Wood, Jr., Circuit Judge

Honorable Kenneth F. Ripple, Circuit Judge

Honorable Jesse E. Eschbach, Senior Circuit Judge

Appeal from the United States District Court for the Western District of Wisconsin
No. 89 CR 47, Judge John C. Shabaz

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-3084
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH N. WILLIAMS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Wisconsin.
No. 89 CR 47-8–**John C. Shabaz,** *Judge.*

ARGUED APRIL 19, 1990 – DECIDED AUGUST 27, 1990

Before WOOD, JR. and RIPPLE, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

RIPPLE, *Circuit Judge.* This is a direct appeal from a federal criminal conviction. After a jury trial, the appellant, Joseph Williams, was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to 27 months imprisonment, followed by 3 years of supervised release. Mr. Williams filed a timely appeal. For the following reasons, we affirm the judgment of the district court.

I

FACTS

Mr. Williams was the subject of an undercover investigation during 1988 and 1989. Paul Harding, an agent with the Bureau of Alcohol, Tobacco & Firearms, met with Mr. Williams on a number of occasions at the bus that Mr. Williams occupied as living quarters. Mr. Williams claimed to Agent Harding that he had no trouble handling a firearm, referred to "his .44," and also described how to manufacture ammunition for a .44 magnum weapon. On April 12, 1989, Agent Harding obtained a search warrant for the bus. The warrant was executed on April 20, 1989. The officers conducting the search discovered a loaded .44 caliber magnum in the lower right hand drawer of a desk located in the bus. Mr. Williams subsequently was indicted for being a felon in possession (on or about April 20, 1989) of a firearm, in violation of 18 U.S.C. § 922(g)(1).

The defendant introduced evidence at trial that the owner of the bus (Henry Yates) was actually the owner of the gun. Yates testified that, during the day on April 19, 1989, he took the gun to an area near the bus and fired at tree stumps. He went into the bus, cleaned the gun, and placed it in the desk while Mr. Williams was not present. He left it there inadvertently and had not removed it by the time the search warrant was executed the next day. Another witness, Phyllis Orlando, testified that she had looked into the drawer the day before the search warrant was executed and did not see a gun.

The government introduced testimony at trial from Agent Harding who said that he met with Mr. Williams

over a four month period and that, on January 9, 1989, Mr. Williams told Agent Harding that he had fired .44 magnum guns and that he had no problems firing such guns. On January 18, 1989, Agent Harding again met Mr. Williams at the bus. During this meeting, Mr. Williams told Agent Harding that he could handle .44 magnum guns. Agent Harding testified that the defendant then reached toward the top drawer of the desk and, before actually opening the drawer, turned to Agent Harding and pretended as if he were pulling a trigger on an imaginary gun. They then went to a nearby van. Mr. Williams pointed out bullet holes in the van and claimed that he had fired his .44 magnum into the van.

Agent Harding met once again with Mr. Williams on February 7, 1989. During their conversation Mr. Williams discussed how the .44 magnum operated. He pointed out a bullet hole in the desk that he claimed was an accidental discharge of the gun. At no point during any of these meetings did Mr. Williams actually show a gun to Agent Harding. However, several individuals testified at trial that they did see Mr. Williams in possession of a gun. One witness, Jonathan Anties, identified a firearm as the one shown to him by Mr. Williams in October 1988. Mr. Anties testified that Mr. Williams removed a .44 magnum from his desk drawer while the two were in Mr. Williams' bus. In addition, Mr. Anties testified that he saw Mr. Williams on 20 to 40 occasions with the firearm in his possession. Other witnesses, including neighbors and friends, testified to seeing Mr. Williams with a .44 magnum firearm during 1988 and 1989.

The jury found Mr. Williams guilty. The district court received the probation office's sentence calculations

which indicated a range of 18 to 24 months imprisonment based on an offense level of 9 and a criminal history category of V. The district court departed upward from the guidelines, determining that the criminal history category did not reflect adequately the seriousness of Mr. Williams' past criminality. That particular finding was based, at least in part, on two felony convictions in 1966 and 1967 which were not considered in determining the criminal history category. The district court concluded that the correct criminal history category should be VI and sentenced Mr. Williams to 27 months imprisonment. Mr. Williams filed a timely appeal.

II
ANALYSIS

A. *Sufficiency of the Evidence*

Mr. Williams asserts that the "unimpeached" evidence of his witnesses indicated that Yates owned the firearm and that Yates normally kept the firearm locked in his bedroom. Appellant's Br. at 11. Furthermore, Mr. Williams stresses the story that Yates told at trial: that Yates came into Mr. Williams' bus to use an amateur radio, placed the firearm in a drawer by the radio, and forgot to take the firearm with him when he left. Based on this evidence, Mr. Williams claims that he did not have *knowing* possession of the firearm as required under 18 U.S.C. § 922(g)(1).

A defendant bears a heavy burden when he challenges the sufficiency of evidence. " 'The test is whether after viewing the evidence in the light most favorable to the government, "*any* rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." ' " *United States v. Herrero*, 893 F.2d 1512, 1531 (7th Cir.) (quoting *United States v. Pritchard*, 745 F.2d 1112, 1122 (7th Cir. 1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis supplied by *Jackson* court))), *cert. denied*, 110 S. Ct. 2623 (1990). Based on this demanding test, we cannot say that the evidence submitted to the jury made conviction impermissible. The evidence included eyewitness accounts tying Mr. Williams to the firearm and statements made by Mr. Williams to an undercover police officer bragging about owning and firing a .44 magnum. Faced with conflicting stories from a number of witnesses who claimed to see Mr. Williams in possession of the firearm and Mr. Yates' testimony to the contrary, it is quite possible that the jury decided to believe that Mr. Williams possessed the firearm. The evidence supporting such a conclusion is certainly sufficient to support Mr. Williams' conviction under the standard we must apply.

B. *Upward Departure*

According to the application of the Sentencing Guidelines, Mr. Williams was classified with a criminal history category of V. Combined with his offense level of 9, his sentencing range was 18-24 months. The district court determined that the criminal history category did not reflect adequately the seriousness of Mr. Williams' offenses and his propensity for committing additional crimes in the future. The court therefore increased the criminal history category from V to VI, yielding a sentencing range of 21-27 months. We examine the district court's departure from the Sentencing Guidelines "to

determine whether it was reasonable in light of the district court's explanations for its departure at the time of sentencing." *United States v. Gaddy*, No. 89-3037, slip op. at 3 (7th Cir. July 26, 1990). We review the grounds stated for departure under the *de novo* standard, but accept factual findings supporting the departure unless clearly erroneous. Finally, we must determine whether the amount of departure was reasonable. *Id.* at 3-4; *United States v. Williams*, 901 F.2d 1394, 1396 (7th Cir. 1990); *see also United States v. Gardner*, No. 89-6289, 1990 U.S. App. Lexis 9887, at *5 (10th Cir. June 18, 1990).

The district court decided to depart because, in its view, the criminal history category did "not adequately set forth the criminal history of this Defendant." R.61 at 305. Mr. Williams claims that the departure was erroneous in two respects: the district court should not have considered two convictions that were more than fifteen years old,[1] and the court improperly counted arrests that did not result in conviction.

1. General principle: Guideline § 4A1.3

Guideline § 4A1.3 allows the district court to depart from the sentence "[i]f reliable information indicates that

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[1] Guideline § 4A1.2(e)(1) limits inclusion in the calculation of criminal history to felonies that occurred within fifteen years of the commencement of the currently charged offense. However, application note 8 to that section recognizes that this time limit is not immutable: "if the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct . . . , the court may consider this information in determining whether to depart and sentence above the applicable guideline range."

the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct. . . . " Some types of information, such as arrest records, may not be considered in departing upward. Beyond what may not be considered, the guidelines provide only partial guidance by setting forth a nonexclusive list of what might be "reliable information." The guidelines direct that, after reviewing the evidence of a defendant's past criminality and propensity for future crime, the district court may "conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines." Guideline § 4A1.3.

2. Convictions more than fifteen years old

The district court took into consideration two felonies – unlawful taking of a motor vehicle and forgery – which were not included in the calculus for determining Mr. Williams' criminal history category because they occurred more than fifteen years prior to the current offense. *See* Guideline § 4A1.2(e)(1). The guidelines provide two ways for the district court to consider the old convictions for purposes of upward departure. First, application note 8 to § 4A1.2 allows the court to consider older convictions "[i]f the government is able to show that [the] sentence . . . is evidence of similar misconduct" or that the defendant received a "substantial portion of income from criminal livelihood." *See Gardner*, 1990 U.S. App. Lexis 9887 at *7-8; *United States v. De Luna-Trujillo*,

868 F.2d 122, 124-25 (5th Cir. 1989).[2] The sentences involved in this case are not suited for consideration under this rationale, because the two crimes apparently are nonviolent and thus substantially dissimilar to the current conviction (possession of a firearm).

The second way in which the old convictions might be considered is under section 4A1.3 as "reliable information." Dissimilar criminal conduct occurring more than fifteen years prior to the current offense still may be relevant in determining whether the criminal history category underrepresents the defendant's criminality. *Cf. United States v. Carey*, 898 F.2d 642, 645-46 & 646 n.5 (8th Cir. 1990) (even when record did not reflect whether old burglary convictions were violent crimes or gun-related, district court properly considered them as "reliable information" under § 4A1.3 to increase criminal history category on defendant convicted under 18 U.S.C. § 922(g)). As our colleagues on the Tenth Circuit recently commented, older convictions may "reflect a defendant who has shown himself to be, in reality, a recidivous criminal." *United States v. Jackson*, 903 F.2d 1313, 1318 (10th Cir. 1990) (district court properly referred to, *inter alia*, a twenty-one

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[2] In a similar case involving possession of a firearm by a felon, the Ninth Circuit determined that the district court correctly increased the criminal history score to account for convictions occurring more than fifteen years prior to the charged crime. The old convictions were for assault with a deadly weapon and assault and battery. "Inasmuch as they show a propensity toward violence and a willingness to use force, these crimes may be viewed as similar to possession of a firearm by a felon." *United States v. Cota-Guerrero*, No. 89-30082, 1990 U.S. App. Lexis 7464 at *5 (9th Cir. July 16, 1990).

year old forgery conviction in applying § 4A1.3 to increase criminal history category of defendant convicted of being a felon in possession of ammunition). We conclude that such old convictions may – in appropriate circumstances – be "reliable information" indicating more extensive criminal conduct than otherwise reflected by the criminal history category.

Here, the two convictions in question were not the *sole* basis for departure. As we shall discuss more specifically later, the district court considered these convictions along with other aggravating factors that, taken together, required, in the district court's view, an upward departure. We cannot say that consideration of these two convictions as part of an overall assessment of the defendant's criminal background was inappropriate.

3. Previous arrests not resulting in conviction

At the sentencing hearing, the district court referred to the presentence report, which included a short discussion of the defendant's past charged criminal conduct that did not result in conviction, and the defendant's objections to the report. In addition, the Assistant United States Attorney presented the court with a copy of the defendant's arrest record.[3]

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[3] The arrests included one for attempted rape and one for assault with a dangerous weapon. According to the presentence report, both charges were dismissed because the complaining witness failed to appear. Mr. Williams filed objections to the presentence report claiming that the two charges were each dismissed after the veracity of the complaining witnesses was called into question.

There is no dispute that a district court may not rely solely upon an arrest record as the basis for an upward departure. *See United States v. Cantu-Dominguez*, 898 F.2d 968, 970-71 (5th Cir. 1990); *United States v. Cervantes*, 878 F.2d 50, 55 (2d Cir. 1989); Guideline § 4A1.3. Evidence based solely on police records of the arrest is not sufficient to satisfy the "reliable information" requirement. *United States v. Cota-Guerrero*, No. 89-30082, 1990 U.S. App. Lexis 7464 at *6 (9th Cir. July 16, 1990). Nevertheless, the guidelines allow the district court to go beyond the arrest record itself and to consider whether the underlying facts evidence "prior similar adult conduct not resulting in a criminal conviction." Guideline § 4A1.3(e). Courts have construed this subsection to include charges that were dropped when a witness failed to appear, *United States v. Gayou*, 901 F.2d 746, 748 (9th Cir. 1990), charges that were dismissed after the defendant made restitution to the victims, *United States v. Russell*, Nos. 89-6142 & 89-6219, 1990 U.S. App. Lexis 9851 at *12 (10th Cir. June 20, 1990), and admissions by the defendant that he committed non-charged criminal acts, *United States v. Spraggins*, 868 F.2d 1541, 1544 (11th Cir. 1989). The focus of our review upon appeal is whether the evidence of prior conduct is sufficiently trustworthy to be considered "reliable information."

The district court in this case specifically articulated the principle that it could *not* base an upward departure solely on the arrest record. However, while relying, at least in part, on the conduct described in the arrest record, it did not state, with any clarity, the factual basis for its reliance. The government notes that two of the arrests – for rape and for assault with a dangerous

weapon – are described in the presentence report as having been dismissed because a complaining witness failed to appear. However, even if we assume that this description would be adequate for purposes of consideration under section 4A1.3, the defendant contested the accuracy of the description. The district court never resolved the disagreement. *See* Fed. R. Crim. P. 32(c)(3)(D). Therefore, we cannot say that, even with respect to these two arrests, the district court relied upon accurate and reliable evidence that the arrests are indicative of a more significant criminal history than reflected by the guidelines. The determination that the arrests indicated similar criminal conduct must be based on facts apart from the arrest record itself and articulated as such by the district court.[4]

4. Harmless error

It was error for the district court to consider the prior arrests of the defendant that had not resulted in conviction because the court did not rely upon reliable evidence that the conduct described in those arrest entries was indicative of a more severe criminal history. Nevertheless, vacation of the sentence is not necessarily required. This circuit has adopted the rule that a sentence nevertheless may be upheld if there are proper factors that, standing alone, would justify the departure. *See United States v.*

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[4] We do not mean by this that the district court must incant a precise formula when discussing prior arrests, *see United States v. Jordan*, 890 F.2d 968, 977 (7th Cir. 1989), but we do expect that the district court will articulate precise reasons for concluding that the arrests are "reliable information."

Franklin, 902 F.2d 501, 508-09 (7th Cir. 1990).[5] Therefore, we shall examine the other factors that the district court considered in deciding to depart upward.

In this case, the district court engaged in a searching inquiry into the entirety of Mr. Williams' past criminal conduct. In addition to considering the convictions more than fifteen years old, the court noted that Mr. Williams previously had been convicted of the same crime – felon in possession of a firearm. This court has acknowledged that a previous conviction on the same charge can support a finding that the criminal history category is inadequate. *United States v. Williams*, 901 F.2d 1394, 1398-99 (7th Cir. 1990); *United States v. Schmude*, 901 F.2d 555, 559 (7th Cir. 1990); *see also United States v. De Luna-Trujillo*, 868 F.2d 122, 124-25 (5th Cir. 1989). Moreover, Mr. Williams' propensity for violent crime was indicated by threats he made to the lives of DEA agents and their families. We conclude that, despite the error noted, the court correctly determined that Mr. Williams' criminality was not reflected properly in the criminal history category and that the relevant evidence justified the rather modest increase in sentence.

C. *Ineffective Assistance of Counsel*

Mr. Williams argues that he was denied effective assistance of counsel in four respects. He contends that

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[5] *See also United States v. Rodriguez*, 882 F.2d 1059, 1066-68 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). *But see United States v. Zamarripa*, No. 89-2145, 1990 U.S. App. Lexis 9251 at *14 (10th Cir. June 11, 1990); *United States v. Hernandez-Vasquez*, 884 F.2d 1314, 1315-16 (9th Cir. 1989).

counsel should have 1) challenged the search warrant; 2) challenged the underlying felony conviction; 3) obtained the criminal records of the government witnesses; and 4) substantiated through ownership records the fact that Yates owned the gun.

In order to succeed on a claim of ineffective assistance of counsel, the defendant "must demonstrate that: (1) 'counsel's representation fell below an objective standard of reasonableness' and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir. 1989) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)), *cert. denied*, 110 S. Ct. 873 (1990). The defendant has the burden of satisfying both prongs of this test. *Shepard v. Lane*, 818 F.2d 615, 619 (7th Cir.), *cert. denied*, 484 U.S. 929 (1987).

Mr. Williams' appellate counsel relies exclusively on conclusory allegations of ineffectiveness. For example, the entire discussion of the first two asserted grounds is as follows:

> In the case at bar Trial Counsel did not challenge the Search Warrant, and did not challenge Williams' prior convictions. Had he successfully challenged either of these 2 points the conviction of the defendant could not be sustained. To convict a defendant of *knowingly* receiving a firearm, which had been shipped in interstate commerce, after being convicted of a crime punishable by imprisonment in excess of one year, the prior conviction must be constitutionally valid.

Appellants Br. at 12-13. The brief does make reference to a document filed by Mr. Williams in the district court that details his assertions of ineffectiveness. Nevertheless, a more plenary discussion by counsel of the allegations in the context of the *Strickland* test is required.

Neither counsel's conclusory statements in the brief nor Mr. Williams' allegations in his document demonstrate that, *but for* the alleged errors by trial counsel, there is a "reasonable probability" that Mr. Williams would have been acquitted. On the basis of this record, we also are not convinced that trial counsel's performance fell below an objective standard of reasonableness. Mr. Williams presents no argument to explain how challenging the search warrant could have been successful in this case. Counsel is not required to make perfunctory motions with no basis of support in the record. Since appellate counsel suggests no such basis, it is impossible for this court to conclude that trial counsel was unreasonable in not making the motion at trial. *See Strickland*, 466 U.S. at 689 (because of the difficulty of evaluating trial decisions, court should be highly deferential when reviewing charges of deficient performance). We conclude, therefore, that Mr. Williams has failed to meet his burden of demonstrating ineffective assistance of counsel.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

SUPREME COURT OF THE UNITED STATES

No. 90-6297

Joseph Williams,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 18, 1991

No. 90-6297

In The

Supreme Court of the United States

October Term, 1990

JOSEPH N. WILLIAMS,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

KENNETH H. HANSON
(Appointed by this Court)
135 S. LaSalle Street
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312-845-2900
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QUESTION PRESENTED

Whether or not in a Sentencing Guidelines case a sentence must be remanded and re-sentenced if both improper and proper factors are relied upon in sentencing or whether such a sentence may be upheld if there are proper factors standing alone that would justify the imposition of the sentence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, No. 89-3084 is reported as 910 F.2d 1574, and was entered on August 27, 1990 and is reprinted in the Joint Appendix at J.A. 71. The district court issued no written opinion in this case.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit, sought to be reviewed by this petitioner, was entered on August 27, 1990. The petition for Writ of Certiorari was filed on November 21, 1990, and was granted on March 18, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1245(1).

STATUTE INVOLVED

18 U.S.C. 922 (g)(1) is reproduced here:

> (g) It shall be unlawful for any person – (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

The defendant was indicted in the United States District Court for the Western District of Wisconsin charging that: "having been convicted by a court of a felony, did knowingly and unlawfully . . . possess a Virginian Dragoon revolver, .44 caliber magnum, having the serial number 8315, which had traveled in and affected interstate commerce." On July 25, 1989 the defendant was found guilty by a jury, after a trial before the Honorable Judge John C. Shabaz in the U.S. District Court for the Western District of Wisconsin. On September 20, 1989, Judge Shabaz entered judgment finding the defendant guilty of 18 U.S.C. 922 (g)(1), possession of a firearm by a convicted felon, and was sentenced to be imprisoned for a term of 27 months followed by a three year term of a supervised release. J.A. 62-65. Notice of Appeal was timely filed on September 22, 1989. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court on August 27, 1990. J.A. 70.

SUMMARY OF THE ARGUMENT

In a Sentencing Guidelines case, it was incorrect for the Seventh Circuit to take the position, and have a rule, that if improper factors were considered in the sentencing, vacation of the sentence is not necessarily required, and that such a sentence, with improper factors considered therein may be upheld if there are proper factors that standing alone would justify departure. J.A. 81.

The correct position has been taken by the Ninth and Tenth Circuits which hold that if both improper and proper factors are considered in sentencing, the sentence must be vacated and the case remanded, as there is no possible way for a reviewing court to determine to what extent the improper factors were involved in the sentence.

ARGUMENT

The district court determined that an upward departure from Sentencing Guidelines was warranted based upon "reliable information" indicating that the criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct nor the likelihood that the defendant will commit other crimes. J.A. 68-69.

The district court in so departing considered two convictions more than 15 years old which were not counted in the criminal history. The convictions for the unlawful taking of a motor vehicle and forgery were both felonies and although having occurred in 1966 and 1967, respectively, they suggested to the district court that the defendant's career of criminal activity, unless discouraged, will continue. The district court also considered *numerous arrests for which the defendant has not been prosecuted*. The district court then held that the serious criminal conduct reflected in those arrests, coupled with those convictions more than 15 years old, not considered in the guidelines, suggested after a review of all the relevant information, that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, category V.

J.A. 69. The district court accordingly determined that the defendant should be in category VI, rather than category V. J.A. 69.

The Court of Appeals for the Seventh Circuit held on review that *it was error* for the district court to consider the prior arrests of the defendant that had not resulted in convictions because they were not "reliable evidence" that the conduct described in the arrest entries was indicative of a more severe criminal history. J.A. 81. The Seventh Circuit held in this case and in *United States v. Franklin*, 902 F.2d 501, 508-09 (7th Cir. 1990), that a sentence may be upheld notwithstanding such error, if there are proper factors that standing alone would justify departure. J.A. 81-82.

However, the Ninth Circuit held in *United States v. Hernandez-Vasquez*, 884 F.2d 1314, 1315-16 (9th Cir. 1989) that:

> "The guidelines anticipate that departure will be rare. Sentencing Guidelines ch. 1 Par. A, Introduction 4(b). . . . If a court relies on both proper and improper factors, *the sentence must be vacated* and the case remanded. . . .
>
> Because the district court considered improper factors, *we must vacate the sentence* and remand for resentencing." (emphasis supplied)

In addition the Ninth Circuit held in remanding *United States v. Nuno-Para*, 877 F.2d 1409, 1414 (9th Cir. 1989):

> "Moreover, because the court's statement of reasons contained an improper as well as a proper basis for departure, we have no way to determine whether any portion of the sentence was based upon consideration of the improper factors. *See United States v. Petitto*, 767 F.2d 607, 609-10 (9th Cir. 1985) (where district court fails to determine the accuracy of challenged information in the presentence report or to state that it is not relying on such information, the judgment must be reversed and the case remanded for resentencing)"

The Tenth Circuit held in *United States v. Zamarripa*, 905 F.2d 337, 342 (10th Cir. 1989):

> "When one of two or more stated reasons for departure is invalid, the case must be remanded for resentencing because the reviewing court cannot determine whether the same departure would have resulted absent the improper factor. . . . Consequently, we vacate the sentence and remand."

See also United States v. Michael, 894 F.2d 1457, 1460 (5th Cir. 1990).

There is thus a conflict between the Seventh, Ninth and Tenth Circuits as to the use of improper factors in sentencing. The Seventh Circuit takes the position that notwithstanding the use of improper factors such as "prior arrests not resulting in convictions" in computing a sentence that the sentence may be upheld if there are proper factors standing alone that would justify the sentence. J.A. 81.

The Seventh Circuit clearly stated its rule in this regard in its opinion in this case: *"It was error for the district court to consider the prior arrests of the defendant that had not resulted in conviction.* . . . Nevertheless, vacation of the sentence is not necessarily required. *This circuit has adopted the rule that a sentence nevertheless may be upheld it*

there are proper factors that, standing alone, would justify the departure." 910 F.2d at 1580 (emphasis supplied). J.A. 81.

The Ninth and Tenth Circuit hold that if a court relies on both proper and improper factors in sentencing, *the sentence must be vacated and the case remanded.*

The weight of reason and logic clearly indicate that the Ninth and Tenth Circuit Courts of Appeal have decided the issue correctly. If both improper and proper factors are considered in sentencing, as was done herein by the Seventh Circuit, there is no possible way to determine to what extent the improper factors were involved in the final sentence.

It should be noted that the Federal Sentencing Guidelines Manual, 1991 Edition, is silent as to a specific answer on this particular issue.

CONCLUSION

In view of all the above it is respectfully requested that this Court fashion a proper standard of appellate review in Sentencing Guidelines cases and resolve the conflict between the Seventh, Ninth and Tenth Circuit Courts of Appeal as set forth herein, and hold that a sentence must be remanded for re-sentencing if both improper and proper factors are relied upon in sentencing notwithstanding that there may be proper factors standing alone that would justify the imposition of the sentence.

It is further respectfully requested that the sentence in the case at bar be vacated and remanded for sentencing on proper factors alone.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals was required to remand this case to the district court for resentencing after finding invalid one of the grounds that the district court cited in explaining its decision to depart upward from the Sentencing Guidelines range.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 71-84) is reported at 910 F.2d 1574.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1990. The petition for a writ of certiorari was filed on November 21, 1990, and was granted on March 18, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3742 provides, in pertinent part, as follows:

(a) **Appeal by a defendant.**—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

* * * * *

(e) **Consideration.**—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title [Sections 3551 through 3586]; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) **Decision and disposition.**—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

* * * * *

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 27 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. J.A. 71-84.

1. Petitioner, a previously convicted felon, became the subject of an undercover investigation by the Bureau of Alcohol, Tobacco and Firearms (ATF) that began in the fall of 1988. Paul Harding, an ATF agent, met with petitioner seven times over a four-month period at petitioner's home in Mazomanie, Wisconsin. J.A. 72-73; Tr. 14-17.

In the course of those meetings, petitioner told Agent Harding that he had fired .44 magnum handguns, that he had no problem handling a firearm of that size, and that he knew how to manufacture armor-piercing ammunition for his own .44 magnum. J.A. 72-73. Petitioner also showed Harding some bullet holes in a nearby van and said he had fired his .44 magnum into the van. J.A. 73. Several other witnesses testified that they had seen petitioner in possession of a .44 magnum gun on a number of occasions. Tr. 50-55, 62-67, 77-80. On April 12, 1989, Agent Harding obtained a search warrant for petitioner's home, where officers found a loaded .44 caliber magnum firearm in a desk drawer. J.A. 72.

2. Petitioner was convicted of unlawful possession of the .44 magnum firearm. The presentence report calculated his sentencing range under the Sentencing Guidelines as 18 to 24 months' imprisonment. That

range reflected an offense level of 9 and a criminal history category of V. J.A. 73-74.

The district court found that criminal history category V did not adequately reflect either the seriousness of petitioner's past criminal conduct or the likelihood that he would commit more crimes in the future. For that reason, the court concluded that an upward departure was appropriate. J.A. 68-69. Using the next higher criminal history category of VI, for which the Guidelines range was 21 to 27 months, the court sentenced petitioner to 27 months' imprisonment, an upward departure of 3 months from the 24-month sentence to which he was exposed under the Guidelines range for category V. The district court explained that in deciding to depart, it had considered two convictions that were too old to be counted in calculating petitioner's criminal history category: convictions for car theft and forgery in 1966 and 1967. See J.A. 46. While those convictions were old, the court explained, "they nonetheless suggest this defendant's career of criminal activity, unless discouraged, will continue." J.A. 69; see J.A. 39-40. The court also made note of petitioner's many arrests for serious criminal conduct that did not lead to prosecution. The court observed that "[t]he serious criminal conduct reflected in those arrests, coupled with those convictions not considered in the guidelines, suggest that after a review of all the relevant information this defendant's criminal history is more serious than that of most defendants in the same criminal history category." J.A. 69; see J.A. 53-54. The court then summarized the reasons for sentencing as it did, J.A. 69:

> The defendant is a 42-year-old offender with an extensive prior record. This is the second

> time he has come before the federal court for unlawful possession of a weapon. He has also threatened violence to undercover agents and is capable of violence. In view of his prior extensive criminal record and propensity for further crime and violence, the defendant is sentenced at the top of the guidelines.

3. The court of appeals affirmed. In reviewing the district court's departure decision, the court of appeals found that the district court's reliance on the two previous convictions was appropriate under Sentencing Guidelines § 4A1.3, which allows consideration of old convictions as " 'reliable information' indicating more extensive criminal conduct than otherwise reflected by the criminal history category." J.A. 79. The court of appeals found, however, that it was improper for the district court to rely on petitioner's arrest record. Petitioner's prior arrests could not support the district court's departure decision, the court of appeals held, because the district court did not set forth any basis other than the arrest record itself to suggest that the arrests reliably reflected criminal conduct on petitioner's part. J.A. 80-81, citing Sentencing Guidelines § 4A1.3.

The court of appeals nevertheless upheld the sentence. It found the three-month departure to be proper, based on the valid factors on which the district court relied. Those factors included not only the two convictions from 1966 and 1967, but also the threats petitioner had made on the lives of undercover agents and their families, see J.A. 11-13, 29-30, and the fact that petitioner had a previous conviction for the same offense, see J.A. 54-55. In light of those factors, the court of appeals held that the district court "correctly determined that [petitioner's] criminality was not reflected properly in the criminal history category

and that the relevant evidence justified the rather modest increase in sentence." J.A. 82.

SUMMARY OF ARGUMENT

The issue in this case is one of remedy. It arises only after an appellate court has determined that in departing from the sentencing range indicated by the Sentencing Guidelines, the district court relied in part on an impermissible factor. The issue before this Court is whether, after making such a determination, a reviewing court must invariably remand the case to the district court for resentencing.

The answer to that question is found in the statute governing appeals from sentences imposed under the Sentencing Guidelines. The statute, 18 U.S.C. 3742, provides that if the sentence falls outside the applicable Guidelines range, the reviewing court must remand for resentencing if it finds that the sentence is unreasonable. 18 U.S.C. 3742(f)(2). If the defendant challenges the sentence on the ground that it rested in part on an incorrect interpretation of the Sentencing Guidelines, the reviewing court also must remand for resentencing if it finds that the sentence was imposed "as a result of" the incorrect application of the Guidelines. 18 U.S.C. 3742(f)(1).

The court of appeals agreed with petitioner that the district court misapplied the Guidelines by relying on his arrest record as one of the grounds for departing from the Guidelines sentencing range. Under Section 3742, therefore, the reviewing court was required to remand for resentencing if it found either that petitioner's sentence was unreasonable or that his sentence would have been different but for the error, *i.e.*, that the sentence was "a result of" the error. Because neither condition was met in this

case, the court of appeals was correct in declining to remand this case to the district court for resentencing.

The court of appeals held that the three-month departure in this case was not unreasonable. That conclusion is sound. The modest departure is more than adequately justified by the valid aggravating circumstances cited by the district court, such as petitioner's convictions from the 1960s, his prior conviction for a similar weapons offense, and his threats of violence against government undercover agents and their families. Nothing in the record suggests that the district court would have imposed a different sentence if it had disregarded petitioner's arrest record. It was therefore unnecessary for the court of appeals to remand the case for resentencing, since there was no showing that the departure was unreasonable or was a result of the misapplication of the Sentencing Guidelines.

ARGUMENT

THE COURT OF APPEALS PROPERLY AFFIRMED THE SENTENCE IN THIS CASE BASED ON THE VALID GROUNDS FOR DEPARTURE CITED BY THE DISTRICT COURT

A. The Sentencing Reform Act Permits Affirmance Of A Departure Decision That Is Based On Both Valid And Invalid Grounds

The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987-2034, established a guideline system of sentencing. Acting pursuant to the statute, the Sentencing Commission established Guidelines that set presumptive sentencing ranges calculated by reference to an offender's conduct and his criminal background. The Act provides that a court may depart from the sentencing range dictated

by the Sentencing Guidelines if it finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" and that the aggravating or mitigating circumstance justifies a sentence outside the Guidelines range. 18 U.S.C. 3553(b).

When a district court departs above the Guidelines range, the defendant can appeal from the sentence. 18 U.S.C. 3742(a)(3). In such a case, the defendant can obtain relief if the court of appeals determines that the sentence was unreasonable, or that it was imposed in violation of law or as a result of an incorrect application of the Guidelines. 18 U.S.C. 3742(f). Otherwise, the sentence must be affirmed. 18 U.S.C. 3742(f)(3).

When the sentencing court relies on only a single factor in deciding to depart from the Guidelines range, the task of the reviewing court is straightforward: to determine if the reason for the departure is valid and the departure reasonable. If both conditions are satisfied, the sentence is upheld. But when the sentencing court relies on several factors in making its departure decision, and one of the factors is invalid, the question whether the sentence can be affirmed is more complex.

In a case such as this one, in which the defendant claims that the district court departed from the Sentencing Guideline range because of a misapplication of the Guidelines, Section 3742 requires the court of appeals to ask four questions: (1) was there a departure from the applicable Guidelines range; (2) did the district court make an error in applying the Guidelines in the course of making its departure decision; (3) was the misapplication of the Guidelines responsible for the departure; and (4) was the re-

sulting sentence reasonable. In this case, the first two questions have already been answered: there was a departure from the applicable Guidelines range, and the court of appeals held that the district court misapplied the Guidelines by relying on petitioner's arrest record as a factor in the departure decision.[1] The issue in this case is how the resolution of the remaining two questions affects the proper disposition of the case. Petitioner argues (Br. 6) that whenever the reviewing court finds that the district court relied on an invalid factor in making its departure decision, the court must vacate the sentence and remand for resentencing. We disagree. In our view, a remand for resentencing is required only if the court of appeals finds that the departure was unreasonable or that the misapplication of the Guidelines was responsible for the departure.

The language of the statute provides the answer. First, a sentence that departs from the Sentencing Guidelines range must be "reasonable." If it is not, the court of appeals must remand the case to the district court for resentencing. 18 U.S.C. 3742(f)(2). Second, a sentence must not be imposed "as a result of" a misapplication of the Sentencing Guidelines. Therefore, when a court of appeals determines that the district court has made an error in applying the Guidelines and the error has resulted in a greater sentence than the district court otherwise would have imposed, the court must remand for resentencing. 18 U.S.C. 3742(f)(1). Conversely, a remand for resentencing is not required if the sentence the district court imposed is reasonable and there is no indication that the sentence would have been different absent

[1] We have not challenged the court of appeals' decision in that regard.

the challenged misapplication of the Guidelines. 18 U.S.C. 3742(f)(3).[2]

1. *A Sentence can be "Reasonable" Even if Some of the Reasons Given by the Sentencing Court To Justify the Sentence are Invalid*

Congress has not defined the term "unreasonable," as that term is used in Section 3742. Nonetheless, the statute makes it clear that the task of determining whether a sentence is unreasonable is left to the judgment of the reviewing court, subject to two provisos: that the court should consider the factors set forth in the sentencing provisions of Title 18, especially 18 U.S.C. 3553(a); and that the court should consider "the reasons for the imposition of the par-

[2] Several courts of appeals have addressed the question whether resentencing is required whenever the reviewing court finds that some, but not all, of the sentencing factors relied on by the sentencing court are invalid. Some have held that resentencing is routinely required in such cases. See *United States* v. *Zamarripa*, 905 F.2d 337, 342 (10th Cir. 1990); *United States* v. *Hernandez-Vasquez*, 884 F.2d 1314, 1315 (9th Cir. 1989); *United States* v. *Nuno-Para*, 877 F.2d 1409, 1414 (9th Cir. 1989). Others have held that resentencing is not ordinarily required in such cases. See *United States* v. *Alba*, No. 90-1523 (2d Cir. May 23, 1991), slip op. 4488-4490; *United States* v. *Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991); *United States* v. *Christoph*, 904 F.2d 1036, 1042 (6th Cir. 1990), cert. denied, 111 S. Ct. 713 (1991); *United States* v. *Franklin*, 902 F.2d 501, 508-509 (7th Cir.), cert. denied, 111 S. Ct. 274 (1990); *United States* v. *Rodriguez*, 882 F.2d 1059, 1068 (6th Cir. 1989), cert. denied, 110 S. Ct. 1144 (1990); see also *United States* v. *Hummer*, 916 F.2d 186, 195 n.8 (4th Cir. 1990), cert. denied, 111 S. Ct. 1608 (1991). The discussion of the point in most of these cases is quite abbreviated, and in none of the cases is there a detailed discussion of the language of Section 3742, the statute that governs appellate review of Guidelines sentences.

ticular sentence, as stated by the district court." 18 U.S.C. 3742(e)(3).

The statutory scheme thus gives a reviewing court broad discretion in determining the reasonableness of a sentence in light of the statutory factors to be considered in sentencing. See 18 U.S.C. 3553(a), 3742(e)(3)(A). By directing the reviewing court's attention to the reasons given by the district court, the statute suggests that the district court's explanation of its sentencing decision may assist or channel the reviewing court's reasonableness inquiry. But nothing in the statute requires the court of appeals to set aside the district court's sentence and remand the case for resentencing if the court of appeals, after its own inquiry, finds the sentence to be a reasonable one under all the circumstances. Therefore, even if the court of appeals disagrees with one or more of the reasons given by the district court for imposing a particular sentence, the court of appeals may still find the sentence to be reasonable and a remand therefore unnecessary under 18 U.S.C. 3742(f)(2).[3]

[3] That is not to say that it would necessarily be error for a court of appeals to remand the case to a district court when the only issue before the court of appeals is whether the sentence is unreasonable. The statutory reference to the district court's reasons for selecting a particular sentence suggests that there may be cases in which the court of appeals' reasonableness inquiry could benefit from a supplemental statement of the district court's views on the matter. Accordingly, after the court of appeals has corrected a legal error in the district court's initial sentencing determination, the court may elect to remand the case to the district court for resentencing or for further explanation of the sentence it imposed. Apart from the authority granted by Section 3742, the court of appeals has general statutory authority to remand a case for "such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106.

2. *An Error in Applying the Sentencing Guidelines Does not Require a Remand for Resentencing as Long as the Sentence was not Imposed "as a Result of" the Misapplication of the Guidelines*

In many cases, a defendant who appeals from a departure decision argues that the departure was improper not only because the sentence imposed was unreasonable, but also because the district court misapplied the Guidelines in making its departure decision. That is true in this case where the defendant argued, and the court of appeals agreed, that the district court misapplied the Guidelines by relying on petitioner's arrest record in evaluating his criminal background. See Sentencing Guidelines § 4A1.3(e).

Even when a reviewing court finds that the district court has misapplied the Guidelines, the case must be remanded for resentencing only if the reviewing court determines that the sentence was imposed "as a result of" the misapplication. 18 U.S.C. 3742(f)(1). That is, unless the court of appeals finds that the challenged sentence would have been different but for the error, the court of appeals need not vacate the sentence and remand the case for further proceedings before the district court.

In some cases, of course, the district court at the time of the departure may specifically indicate that the factor that is later held invalid was critical to the court's decision to depart or was responsible for the degree of the departure. In such cases, it is clear that the sentence was imposed "as a result of" the misapplication of the Guidelines, so the statutory condition for a remand is clearly satisfied. In other cases, the court of appeals will be able to conclude from the circumstances surrounding the sentencing decision that the invalid factor was probably responsible for the district court's decision to depart

or for the degree of the departure. In those cases as well, Section 3742(f)(1) would require the court of appeals to vacate the sentence and remand for resentencing.

Although in many cases the reviewing court will be able to determine whether the district court departed as a result of an invalid factor, that will not always be true. If the district court cites several different factors in support of its departure decision, only one of which is invalid, it sometimes will not be possible to determine that the invalid ground caused the departure.[4] When the reviewing court cannot make such a finding, a remand is not required, because the statutory precondition that the challenged sentence be "determine[d]" to have been "imposed as a result of an incorrect application of the sentencing guidelines" is not satisfied.[5] In cases of that sort, as the Seventh Circuit has noted, the appellate court is under no obligation to "probe the mind of the sentencing judge and try to determine what portions of the departure he or she assigned to the different grounds for departure." *United States* v. *Franklin*, 902 F.2d 501, 508 (7th Cir.), cert. denied,

[4] The statutory requirement that the district court state the reasons for its sentence at the time of sentencing, 18 U.S.C. 3553(c), will ensure that in most cases the court of appeals will be able to determine from the record whether the invalid factor affected the sentence that the district court imposed.

[5] The same general principle applies in cases in which the defendant appeals on the ground that the sentence was imposed "in violation of law." 18 U.S.C. 3742(a)(1). In that setting, as in the case of an alleged misapplication of the Guidelines, a remand is required only if the court of appeals "determines that the sentence was imposed in violation of law"; *i.e.*, the court must conclude that the alleged violation of law affected the sentence that was actually imposed.

111 S. Ct. 274 (1990). Accordingly, in the absence of evidence that the district court would have imposed a different sentence if it had disregarded the invalid factor, the court of appeals should affirm the sentence.

Interpreting Section 3742 to require resentencing only when the court of appeals can conclude that the sentence was unreasonable or that an invalid factor affected the sentence is consistent with congressional policy embodied in the Sentencing Reform Act. Prior to the Act, district courts had almost unlimited discretion in determining what sentence to impose. Appellate review of a sentence that did not exceed the statutory maximum was barred except in very limited circumstances. See *Dorszynski* v. *United States*, 418 U.S. 424, 443 (1974); *Gore* v. *United States*, 357 U.S. 386, 393 (1958). The Sentencing Reform Act introduced appellate review of sentences in order to ensure the proper application of the Sentencing Guidelines. See S. Rep. No. 225, 98th Cong., 1st Sess. 151 (1983). The introduction of appellate review of sentences, however, was not designed to abrogate altogether the district court's sentencing discretion or reverse the court of appeals' traditionally deferential stance toward the district court's exercise of its sentencing function. *Id.* at 150 ("The sentencing provisions * * * are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing"). In light of Congress's concern to preserve the sentencing court's discretion to the greatest extent possible consistent with implementing a rational scheme of appellate review of sentences, it is not surprising that Congress designed the review statute to require sentences to be vacated only when the reviewing court could determine that the sentence was unreasonable or that the challenged error of law was responsible for the sentence that was imposed.

3. *Petitioner's Sentence was Neither Unreasonable nor Imposed as a Result of Misapplication of the Guidelines*

The court of appeals was able to determine, without the need for a remand, that the departure in this case was reasonable and was justified by proper considerations. As the court of appeals observed, the district court conducted a "searching inquiry" into petitioner's past criminal conduct, J.A. 82, and identified several factors that justified an increase in petitioner's criminal history category. J.A. 29-30, 46-47, 53-54, 68-69.

The evidence at the lengthy sentencing hearing showed that petitioner had threatened the ATF undercover agent by saying he would track down the agent's family and blow up his house if petitioner were arrested. Petitioner also made threats to harm others, including DEA agents. J.A. 11-13, 29-30. The court found that petitioner had five previous felony convictions, as well as a recent drunk driving offense, J.A. 46-47. The evidence further showed that one of petitioner's prior convictions was for the same offense with which he was charged in this case: possession of a firearm by a convicted felon. J.A. 51. Even petitioner's counsel conceded that petitioner's criminal record was "certainly lengthy" and "demonstrates a long history of involvement with law enforcement authorities in a number of jurisdictions." J.A. 50.

In finding that criminal history category V did not adequately reflect petitioner's criminal background, the district court placed primary emphasis on petitioner's convictions, stating that "the record is replete with convictions," including five convictions for felonies. J.A. 53. The court then noted that "the 10 points assessed [for criminal convictions under Sentencing Guidelines § 4A1.1] is insufficient for the five felonies." *Ibid.* It was only after making that observation that the court referred to petitioner's long arrest record. In that connection, moreover, the court acknowledged that an arrest record itself may not be used as a basis for departing from a Guidelines sentence. *Ibid.* In light of "all of the relevant information, the types of offenses, the criminal conduct in which [petitioner] has been involved throughout his life," and in light of the two felony convictions from the 1960s that were not considered in calculating petitioner's criminal history score, the court concluded that it should in effect add three points to petitioner's criminal history score, raising his score from 10 to 13 and thus raising his criminal history category from V to VI. J.A. 54.

Recognizing that any valid reason would support a modest departure of three months over the 18 to 24 month sentence to which petitioner was exposed under the Guidelines, the court of appeals correctly concluded that, even without taking into account petitioner's arrest record, the district court almost certainly would have imposed the same sentence. The district court's careful consideration of petitioner's criminal background demonstrates that the three-month departure from the Guidelines range was both reasonable and not the product of the court's consideration of petitioner's arrest record. The court specifically noted that petitioner's criminal history score of 10 was insufficient in light of his five felony convictions, J.A. 53. That comment in itself is a strong indication that the court would have departed from the Guidelines range even absent any reference to petitioner's arrest record. Moreover, the court expressly recognized that it could not rely on petitioner's

arrest record as a ground of departure, and it apparently relied on the arrest record only as corroboration for its observation that petitioner had a lifelong involvement with the criminal justice system. *Ibid.* On this record, then, the court of appeals was entirely justified in declining to vacate petitioner's sentence and remand the case for resentencing.

B. Decisions Of This Court Concerning Appellate Review Of Sentences Support The Action Of The Court Of Appeals In This Case

This Court's decisions on other, related sentencing issues provide support by analogy to the analysis set forth above. For example, in several cases coming before this Court, defendants were convicted on separate counts and received general sentences that were not linked to any one of the counts. In each case, the Court followed the rule that the sentence was valid if the conviction on any of the counts was sustainable. See *Claassen* v. *United States*, 142 U.S. 140, 146-147 (1891); *Pinkerton* v. *United States*, 328 U.S. 640, 641-642 n.1 (1946); *Barenblatt* v. *United States*, 360 U.S. 109, 115 (1959). In his concurrence in *Zant* v. *Stephens*, 462 U.S. 862, 902 (1983), then-Justice Rehnquist explained the "practical basis for the rules articulated in * * * the *Claassen* line of cases":

> [S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does. The fact that one of the countless considerations that the sentencer would have taken into account was erroneous, misleading, or otherwise improperly before him, ordinarily can be assumed not to have been a necessary basis for his decision.

See also *United States* v. *Sacco*, 927 F.2d 726, 729 (2d Cir. 1991) (following the *Claassen* rule where the court of appeals found "no reason to believe that the district court would have given * * * a different sentence absent the * * * [invalid] conviction").

The *Claassen* cases are closely analogous to this case. In each, the reviewing court could not be certain that the sentencing decision would have been the same regardless of the invalid sentencing factor. But in each, the reviewing court found it unnecessary to vacate the sentence because of the possibility that the sentence might have been affected by the invalid factor. As Justice Rehnquist pointed out, the sentencing decision draws on a sufficiently broad range of considerations that it is reasonable to assume that a single invalid factor did not affect the sentencing court's decision unless there is some indication to the contrary.

A recent case involving a jury's decision to impose the death penalty provides another close analogy to this case. In *Zant* v. *Stephens*, 462 U.S. 862 (1983), the jury was required to find one or more aggravating circumstances before imposing the death penalty. The jury found two aggravating circumstances and sentenced the defendant to death. One of the aggravating circumstances, however, was held to be unconstitutionally vague. This Court nevertheless decided that the sentence could stand, 462 U.S. at 864-869, since one of the two aggravating circumstances found by the jury was "valid and legally sufficient to support the death penalty." *Id.* at 881.[6]

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[6] The defendant argued in *Zant* that the case was controlled by *Stromberg* v. *California*, 283 U.S. 359 (1931), which held that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent

This case is no different in principle from *Zant*. Here, the sentencing court expressly stated its reliance on several grounds for a departure from the Guidelines, one of which turned out to be invalid. The remaining grounds, however, were "valid and legally sufficient" to support the quite modest departure ordered by the district court. As in *Zant*, it was therefore proper for the court of appeals to uphold the district court's departure decision.[7]

Finally, the Court's recent decision in *Clemons* v. *Mississippi*, 110 S. Ct. 1441 (1990), provides an-

---

grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant*, 462 U.S. at 881. The *Zant* Court found the *Stromberg* rule inapplicable, because all the cases in which it had been applied involved general verdicts on a record from which the reviewing court was unable to determine the actual ground on which the jury's decision rested, and could not rule out that the decision rested *exclusively* on the invalid ground. 462 U.S. at 881. In *Zant*, by contrast, the jury did not return a general verdict stating simply that it had found at least one aggravating circumstance. See also 462 U.S. at 898 (Rehnquist, J., concurring) ("[T]he *Stromberg* rule is plainly distinguishable, since the jury explicitly returned two concededly valid aggravating circumstances, thereby conclusively negating the inference that it rested *solely* on the invalid circumstance."). In this case, likewise, the findings of the sentencing court make it clear that the court did not rely exclusively on an invalid factor as the basis for departure.

[7] This case bears no resemblance to *United States* v. *Tucker*, 404 U.S. 443 (1972), and *Townsend* v. *Burke*, 334 U.S. 736 (1948), in which this Court ordered resentencing where it was clear that invalid considerations of constitutional dimension overwhelmed all other factors bearing on the sentencing court's decision. See *Tucker*, 404 U.S. at 448 (invalid convictions had a dramatic impact on the sentencing decision); *Townsend*, 334 U.S. at 741 (sentence rested on a foundation that was "extensively and materially false").

other instructive analogy. In *Clemons*, the jury imposed the death penalty after finding two aggravating factors, which outweighed the mitigating circumstances. On appeal, the Mississippi Supreme Court found one of the aggravating factors invalid, but it upheld the death sentence after weighing the remaining aggravating factor against the mitigating circumstances and finding that the death penalty was still appropriate.

The *Clemons* Court held that the Constitution does not prohibit an appellate court from upholding a death sentence after reweighing the mitigating circumstances against the remaining valid aggravating circumstance. 110 S. Ct. at 1446. The Court rejected any notion that due process requires that a jury impose the sentence of death or make the findings necessary to its imposition, and it found no other constitutional bar to appellate reweighing of the aggravating and mitigating factors. Indeed, the Court noted that much the same process of weighing aggravating and mitigating factors was involved in normal appellate review of death sentences, so it considered appellate reweighing of the factors justifying a death sentence consistent with the fairness, reliability, and consistency that are required for the constitutional application of the death penalty. *Id.* at 1448-1449.

The reasoning in *Clemons* applies with equal force here. To the extent that a reviewing court determines for itself whether the valid reasons listed by the district court are sufficient to justify the entire amount of the departure, *Clemons* teaches that that procedure is not unfair or improper, as long as it is consistent with the statutory scheme for appellate review of sentences. See *Clemons*, 110 S. Ct. at 1445-1448. Cf. *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980)

(state law creating entitlement to jury sentencing). As we have shown above, Section 3742 assigns the appellate courts the task of determining the reasonableness of a sentence and determining the effect of an error of law by the district court on the sentence imposed. *Clemons* demonstrates that there is nothing anomalous or unfair about assigning that task to an appellate court as part of the statutory function of appellate review of sentences. There is therefore no impediment, either in the Constitution or the traditional role performed by appellate courts, to reading Section 3742 as it is written.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 90-6297

In The

Supreme Court of the United States

October Term, 1991

JOSEPH N. WILLIAMS,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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RELEVANT STATUTE

18 U.S.C. Sec. 3742 (f) (1) is reproduced here:

> (f) Decision and disposition. – If the court of appeals determines that the sentence –
>
> (1) was imposed in violation of law or *imposed as a result of an incorrect application of the sentencing guidelines*, the court *shall remand* the case for further proceedings with such instructions as the court considers appropriate; (Emphasis supplied)

18 U.S.C. Sec. 3742 (f) (2) (A) is reproduced here:

> (2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusion and –
>
> (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> * * *

REPLY BRIEF FOR THE PETITIONER

Nothing in the respondent's submission can obscure the clear fact that *it was error, with a resulting incorrect application of the Sentencing Guidelines,* for the district court *to consider, in sentencing,* the prior arrests not resulting in convictions of the defendant because such arrests were *not reliable evidence* that the conduct described in the

arrest entries was indicative of a more severe criminal history. (J.A. 69).

The district court had considered these arrests to have reflected therein *serious criminal conduct*, and as such these arrests were a major factor in the district court's upward departure to Category VI from Category V. By so doing the district court *incorrectly applied the Sentencing Guidelines*. This *misapplication* resulted in an increase to a 27 month sentence, the mid-point in Category VI from a 24 month sentence, the mid-point in Category V.

18 U.S.C. 3742 (f) (1) provides that when the court of appeals finds that the sentence of the district court was imposed as a result of *an incorrect application of* the Sentencing Guidelines, the court *shall remand* the case for further sentencing proceedings with such instructions as the court considers appropriate. The Congressional will and directive "shall remand" is clear and precise. There is *no directive* for a test or examination of the sentence for "unreasonableness" by the court of appeals in 18 U.S.C. 3742 (f) (1). Reasonableness, accordingly, is not an issue in the case at bar as this case involves an *incorrect application* of the Sentencing Guidelines which comes within the terms of 18 U.S.C. 3742 (f) (1).

ARGUMENT

THE DISTRICT COURT MISAPPLIED THE GUIDELINES

In this case the district court held, after considering the prior arrests of the defendant not resulting in convictions, that the *serious criminal conduct reflected in those*

arrests, coupled with convictions not considered in the Guidelines, was significantly more serious than that of most defendants in the same criminal history category, and, accordingly, *added three criminal history points to the computation* and thus determined that the defendant *should be in category VI* rather than in category V. (J.A. 69). It is very clear that the district court relied substantially on these arrests not resulting in convictions *in making the upward departure*, and by so doing incorrectly applied the Sentencing Guidelines and brought this case within the terms of 18 U.S.C. 3742 (f) (1).

THE COURT OF APPEALS WAS IN ERROR IN AFFIRMING THE SENTENCE OF THE DISTRICT COURT

18 U.S.C. Sec. 3742 (f) (1) *requires* the court of appeals, if the sentence was imposed as a result of *an incorrect application* of the Sentencing Guidelines, *to remand* the case with further instructions as the court considers appropriate.

Clearly, there is an obvious misapplication of the Sentencing Guidelines by the district court in this case because of the incorrect upward departure. This departure was based upon the *in error* consideration in sentencing of the defendant's prior arrests not resulting in convictions.

The error of the district court in considering in sentencing the numerous arrests for which the defendant had not been prosecuted *resulted* in a clear incorrect application of the Sentencing Guidelines. The district court stated in its sentencing statement (J.A. 69) that *"the*

serious criminal conduct reflected in those arrests, coupled with those convictions not considered in the guidelines, suggest that . . . this defendant's criminal history is significantly more serious than that of most defendants in the same criminal history category. Accordingly, the Court has added three points to the computation of ten and has determined that this defendant is in Category VI, rather than Category V." (Emphasis supplied)

By so adding three points, thus making an incorrect upward departure, and an incorrect application of the Sentencing Guidelines, the district court brought this case within the terms of 18 U.S.C. Sec. 3742 (f) (1).

It should be noted that the district court specifically commented in his sentencing statement as to the *serious nature* of the criminal conduct reflected in the arrests of the defendant which had not resulted in convictions, thus making it clear that these arrests played a major role in the court's basis for the upward departure.

In *United States v. Stephenson*, 887 F.2d 57, 62 (5th Cir. 1989) the court of appeals applied 18 U.S.C. 3742 (f) (1) to a similar case involving consideration in sentencing by the district court of a conviction more than 15 years old in determining the defendant's criminal history category. The court of appeals was thus confronted in *Stephenson* with the same argument by the government as we have here, *i. e.*, that the sentencing error was harmless and that the trial judge would have probably imposed the same sentence regardless of the "harmless error."

The Fifth Circuit stated in its opinion, p. 62:

> "The government invites us to consider the *erroneous* weighing of the prior incarceration as harmless error because the trial judge indicated he would probably have imposed a sentence of 151 months even if he could have adjudged less. We may not do so in light of 18 U.S.C. 3742 (f) (1) which directs:
>
> If the court of appeals determines that the sentence –
>
> (1) was imposed in violation of the law or imposed *as a result of an incorrect application of the sentencing guidelines*, the court *shall remand* the case for further sentencing proceedings with such instructions as the court considers appropriate." (Emphasis supplied)

The Fifth Circuit further stated in its opinion, p. 62: *"Consistent with this clear expression of Congressional will, we will remand for re-sentencing."* (Emphasis supplied)

See also *United States v. Hernandez-Vasquez*, 884 F.2d 1314, 1315-16 (9th Cir. 1989); *United States v. Nuno-Para*, 877 F.2d 1409, 1414 (9th Cir. 1989); and *United States v. Zamarippa*, 905 F.2d 337, 342 (10th Cir. 1990), all of which hold that if the district court relies on both proper and improper factors in sentencing, the sentence must be vacated and the case remanded for re-sentencing.

18 U.S.C. SEC. 3742 (f) (2) AND THE "UNREASONABLE" TEST THEREIN IS NOT RELEVANT, AND DOES NOT APPLY TO THE CASE AT BAR

18 U.S.C. Sec. 3742 (f) (2) is not relevant nor does it apply to this factual situation. 18 U.S.C. 3742 (f) (2) and the "unreasonable" test therein only applies to situations

in which the sentence was *outside* of the *applicable guideline range, and is "unreasonable,"* or was imposed for an offense for which there is no applicable sentencing guidelines, *and is plainly "unreasonable"*. 18 U.S.C. 3742 (f) (2) does not apply and was not intended to be applied, to a situation such as this, which is concerned with an *incorrect application* of the Sentencing Guidelines, and controlled by 18 U.S.C. 3742 (f) (1) which has *no* "reasonable" test therein. There is no Congressional directive in 18 U.S.C. 3742 (f) (1) that the court of appeals conduct an examination as to whether or not the sentence imposed was "reasonable."

The Congressional directive to the court of appeals in 18 U.S.C. 3742 (f) (1), in situations such as this involving an *incorrect application* of the Sentencing Guidelines, *is to remand the case* for further proceedings with such instructions as the court considers appropriate. Accordingly, the government's argument (Br. 16) that the defendant's sentence was not "unreasonable" is not in point or relevant to the issues in the case at bar.

THE GOVERNMENT IS IN ERROR IN ALLEGING THAT THE SENTENCING REFORM ACT PERMITS AFFIRMANCE OF A DEPARTURE DECISION THAT IS BASED ON BOTH VALID AND INVALID GROUNDS

The government in its argument in this regard (Br. 8-11) bases its discussion on a sentence outside of the applicable Guideline Range, which comes within 18 U.S.C. 3742 (f) (2). The case at bar is concerned with a misapplication of the Sentencing Guidelines because of an invalid departure, which comes within 18 U.S.C. 3742 (f) (1). The government in its discussion of this point

continually refers to a departure from the *Guideline Range* which is clearly not relevant or in point to the case at bar.

The government also states (Br. 9) that: "the defendant claims that the district court departed from the Sentencing Guideline range because of a misapplication of the Guidelines. . . . " *The defendant does not so claim.* The defendant claims that there was an invalid upward departure, because of the consideration in sentencing of arrests not resulting in conviction, which resulted in an incorrect application of the Sentencing Guidelines within the terms of 18 U.S.C. 3742 (f) (1) which requires remand. *Accordingly, this section of the government's brief does not state a valid reason for the affirmance of a departure decision that is based on both valid an invalid grounds.*

In addition, the government incorrectly states (Br. 9-10) that Sec. 3742 requires the court of appeals to ask four questions:

(1) was there a departure from the applicable Guidelines range;

(2) did the district court make an error in applying the Guidelines in the course of making its departure decision;

(3) was the misapplication of the Guidelines responsible for the departure;

(4) was the resulting sentence reasonable.

The correct four questions that 18 U.S.C. 3742(e) requires the court of appeals to determine in its review of the record are whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside of the applicable guideline range, and is unreasonable, having regard for –

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

It should be noted that "unreasonable" is not referred to in question 2 which is in point to this case as question 2 is concerned with a sentence imposed as a result of an *incorrect application of the Sentencing Guidelines* which is the issue in this case. Accordingly, the court of appeals is *not required* in question 2 to determine the *reasonableness* of the sentence in cases in which the sentence was imposed as a result of an incorrect application of the Sentencing Guidelines.

The three basic policy objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984 were Honesty, Uniformity and Proportionality in sentencing. It is clear that sentences in which only *proper* factors have been considered are *substantially* more likely to promote these objectives than those which contain improper factors as well.

CONCLUSION

In view of all the above, it is respectfully requested that this Court fashion a proper standard of appellate review in Sentencing Guidelines cases, and hold that a sentence must be remanded for re-sentencing if both improper and proper factors are relied upon in sentencing, which resulted in an incorrect application of the Sentencing Guidelines, notwithstanding that there may be proper factors standing alone that would justify the imposition of the sentence.

It is further respectfully requested that the sentence in the case at bar be vacated and remanded for sentencing on proper factors alone.

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